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Supreme Court, U.S.
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No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE CELOTEX CORPORATION,

Petitioner,

V.

WILLIAM EARL GLASSCOCK, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Are state and lower federal courts properly analyzing due process challenges to punitive damage awards in accordance with this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*?

2. Did Texas law impose sufficiently meaningful and definite constraints on the discretion of the jury in this case to satisfy due process requirements in light of awards of $6,100,000 in punitive damages but only $300,500 in compensatory damages?

3. Does due process allow the imposition by a single jury of eleven separate awards of punitive damages that range from seven times to two hundred times the compensatory awards based upon identical evidence?

4. What limitations does due process impose upon the repeated award of punitive damages against a single defendant for a single course of conduct?

LIST OF PARTIES

Petitioner The Celotex Corporation was the Defendant/ Appellant below.

Respondents are:

William Earl Glasscock
Roy B. Ghent
Lois T. Ghent
Charles Marsh
Leta Faye Marsh
Charles A. Reich
Gary N. Starkey
Linda Starkey
Gus Geisler, Sr.
Lena Geisler
Malvin R. Lane
Nancy Lane
Carlos Gonzalez
Delia Gonzalez
William E. Smith
Sandra Smith
James W. Phillips
Barbara E. Phillips

STATEMENT PURSUANT TO RULE 29.1

The Celotex Corporation is a subsidiary of The Jim Walter Corporation. The Celotex Corporation has no subsidiary or affiliate that has issued shares to the public.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
STATEMENT PURSUANT TO RULE 29.1	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS TO GRANT THE WRIT	4
I. THIS COURT SHOULD GRANT THE WRIT TO PROVIDE NECESSARY GUIDANCE TO THE LOWER COURTS IN DETERMINING THE DUE PROCESS LIMITATIONS ON PUNITIVE DAMAGES RECOGNIZED IN *PACIFIC MUTUAL V. HASLIP*	4
A. The lower courts are not consistent in the application of *Haslip*	4
B. The Texas System of Punitive Damages Does Not Satisfy the Requirements of Due Process Recognized in *Haslip*	7
C. The Lack of Objective Standards in Texas Law is Shown By the Lack of a Reasonable Relationship Between the Punitive Damage Awards and the Compensatory Awards in This Case	13
II. THIS COURT SHOULD GRANT THE WRIT TO CONFIRM THE DUE PROCESS LIMITATIONS ON MULTIPLE AWARDS OF PUNITIVE DAMAGES AGAINST A PARTY FOR A SINGLE COURSE OF CONDUCT	14
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

"Agent Orange" Product Liability Litigation, 100 F.R.D. 718 (E.D.N.Y. 1983) 18
Alamo National Bank v. Kraus, 616 S.W.2d 908 (Tex. 1981) 11
Alexander and Alexander, Inc. v Evander & Associates, Inc., 596 A.2d 687 (Md. Ct. Spec. App. 1991) 5
Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981). 14
Capital Title Co. v. Donaldson, 739 S.W.2d 384 (Tex. App.—Houston [1st Dist.] 1987, no writ) 10
Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985) 15
City of Newport v. Fact Concerts, 453 U.S. 247 (1981).. 14
Cole v. Tucker, 6 Tex. 133 (1851) 14
Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982), cert. denied sub nom. Stover v. Rau, 459 U.S. 988 (1982) 18
George v. International Society for Krishna Consciousness, Cal. Rptr. 2d , 1992 WL 13838 (Cal. App. 1992) 5
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 14
Glasscock v. Armstrong Cork Co., 946 F.2d 1085 (5th Cir. 1991) 1
Hanson v. Johns-Manville Products Corp., 734 F.2d 1036 (5th Cir. 1987) 10
Hofer v. Lavender, 679 S.W.2d 470 (Tex. 1984) 14, 15
Hospital Authority v. Jones, 409 S.E.2d 501 (Ga. 1991) . 6
Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314 (5th Cir. 1985) (en banc) 16, 17
Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986) (en banc) 16
Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, modified, 718 F. Supp. 1233 (D.N.J. 1989) 17, 18
Lorenz v. The Celotex Corporation, 896 F.2d 148 (5th Cir. 1990) 22
Lunsford v. Morris, 746 S.W.2d 471 (Tex. 1988) 9
Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) 5, 7
Maxey v. Freightliner Corp., 665 F.2d 1367 (5th Cir. 1982) 10

CASES — Page

Nationwide Mutual Insurance Co. v. Clay, 525 So.2d 1339 (Ala. 1987) 6
Nebours v. Longview Savings and Loan Association, 700 S.W.2d 901 (Tex. 1985) 13
Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887 (N.D. Cal. 1981), vacated, 693 F.2d 847 (9th Cir. 1982), cert. denied sub nom. A. H. Robins Co. v. Abed, 459 U.S. 1171 (1983) 18
Pacific Mutual Life Insurance Co. v. Haslip, 111 S.Ct. 1032 (1991) 3-9, 14, 19
Ricard v. State, 390 So.2d 882 (La. 1980) 14
Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967) 15, 17
School Asbestos Litigation, 789 F.2d 996 (3d Cir. 1986), cert. denied sub nom. The Celotex Corporation v. School District, 479 U.S. 852 (1986) 18
Southern Life and Health Insurance Company v. Turner, 586 S.E.2d 854 (Ala. 1991) 6
Southwestern Investment Company v. Neeley, 452 S.W.2d 705 (Tex. 1970) 10, 11
State Farm Mutual Auto Insurance Company v. Zubiate, 808 S.W.2d 590 (Tex. App.—El Paso 1991, no writ) 11, 12
Tatum v. Preston Carter Co., 702 S.W.2d 186 (Tex. 1986) . 10, 11
Texaco, Inc. v. Pennzoil, 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) 10
The Celotex Corporation v. Tate, 797 S.W.2d 197 (Tex. App.—Corpus Christi 1990, no writ) 14
Tynberg v. Cohen, 13 S.W. 315 (Tex. 1890) 10, 19
Union National Bank v. Mosbacher, 933 F.2d 1440 (8th Cir. 1991) 9
Wilkes v. Wood, 1 Lofft 1, 98 Eng. Rep. 489 (1763) 14
Wright Titus, Inc. v. Swafford, 133 S.W.2d 287 (Tex. Civ. App.—Austin 1939, writ dism'd judgmt cor.) 14
Wright v. Gifford-Hill & Company, Inc., 725 S.W.2d 712 (Tex. 1987) 10

CONSTITUTIONS AND STATUTES

	Page
28 U.S.C. §1254(1)	2
28 U.S.C. §1332	2
40 C.F.R. §61.150 (1990)	17
40 Fed. Reg. 48,292 (1975)	17
Fed. R. Civ. P. 50(b)	6
Fed. R. Civ. P. 59	6
Tex. Civ. Prac. & Rem. Code §41.007	10
U. S. Const. amend. VII	6

OTHER

Texas Pattern Jury Charge 7.06 (State Bar of Texas, 1989).	9

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner The Celotex Corporation ("Celotex") seeks issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review that Court's judgment and opinion affirming the entry of a judgment by the United States District Court for the Eastern District of Texas, Marshall Division.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported as *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (1991), and is reproduced in the Appendix at A21-25. The judgment of the Fifth Circuit and its order denying the Motion for Rehearing and Suggestion for Rehearing *En Banc* are unreported and are reproduced in the Appendix at A26 and A27-28 respectively. The judgment of the United States District Court for the Eastern District of Texas is unreported and is reproduced in the Appendix at A29-30.

JURISDICTION

The judgment of the Fifth Circuit was entered on October 24, 1991. Celotex's Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied on December 2, 1991. This Court has jurisdiction to review the judgment in this case by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

Jurisdiction in the trial court was based on diversity of citizenship pursuant to 28 U.S.C. § 1332.

STATEMENT OF THE CASE

This action was brought as a series of lawsuits, alleging personal injuries and loss of consortium due to exposure to asbestos-containing products. None of the plaintiffs ever claimed to have worked for Celotex; their exposure was alleged to have occurred in the course of their employment in various construction trades. The actions were consolidated for trial and all other defendants settled during trial.

The case was submitted to the jury on special interrogatories. The jury awarded actual damages to each plaintiff, assessed a percentage of each plaintiff's injuries allegedly caused by Celotex, and assessed punitive damages totalling $6,100,000 in favor of eleven plaintiffs that had recovered a total of $300,500 in compensatory damages.[1] The district court entered judgment based on the jury verdict. For the eleven plaintiffs who were awarded punitive damages, the actual damages awarded against

1 Punitive damages were not sought for the remaining seven plaintiffs, who claimed only loss of consortium. The awards to these seven plaintiffs were not appealed.

Celotex, the punitive damages awarded against Celotex, and the ratio between the two types of damages were as follows:

Plaintiff	Celotex Share-Actual Damages	Punitive Damages	Punitive Multiple
Lane	$ 3,000	$600,000	200:1
Gonzales	8,000	600,000	75:1
Starkey	9,000	600,000	66.7:1
Smith	10,000	600,000	60:1
Ghent, R.	12,500	600,000	48:1
Geisler	14,000	600,000	42.9:1
Phillips	36,000	600,000	16.7:1
Reich	40,000	600,000	15:1
Ghent, L.	9,000	100,000	11.1:1
Marsh	75,000	600,000	8:1
Glasscock	84,000	600,000	7.1:1

App. A29-30.

Celotex appealed. Prior to oral argument, the Fifth Circuit requested further briefing to discuss the application of this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). After argument, the Fifth Circuit affirmed the punitive damage awards against both due process attacks and substantive state law challenges. However, the panel decision exhibited a great deal of discomfort in resolving the punitive damage issues.

The Fifth Circuit's opinion admitted that "the size of the punitive damage awards [against Celotex] makes us pause." A18. The opinion also recognized that there are "inherent problems with the purely subjective Texas rule" for reviewing punitive damage awards. A17. Further, even though Texas law purports to require a reasonable proportion between actual damages and punitive damages, the Fifth Circuit relied upon a recent Texas case which "demonstrates the difficulty in applying this test" of proportionality. A17. Despite these admissions, the Fifth Circuit upheld all eleven awards of punitive damages, even though the ratio between punitive and compensatory damages in the respective awards ranged from 7:1 to 200:1.

REASONS TO GRANT THE WRIT

I. THIS COURT SHOULD GRANT THE WRIT TO PROVIDE NECESSARY GUIDANCE TO THE LOWER COURTS IN DETERMINING THE DUE PROCESS LIMITATIONS ON PUNITIVE DAMAGES RECOGNIZED IN *PACIFIC MUTUAL V. HASLIP*

A. THE LOWER COURTS ARE NOT CONSISTENT IN THE APPLICATION OF *HASLIP*

In *Pacific Mutual v. Haslip*, this Court recognized that due process imposes limits upon jury discretion in the fixing of punitive damages. Although *Haslip* did not go so far as to invalidate the common law system of assessing punitive damages, this Court recognized that a defendant against whom punitive damages are sought has a sufficient interest in "rational decisionmaking" to require "a sufficiently definite and meaningful constraint on the discretion" of fact finders awarding punitive damages. 111 S. Ct. at 1044, 1045. This Court also noted its "concern about punitive damages that 'run wild.' " *Id.* at 1043. Unfortunately, the *Haslip* decision has not provided sufficient guidance to the lower courts to enable them to apply *Haslip* in a meaningful and consistent way.

In the first ten months after the *Haslip* decision was issued, there were at least 21 reported decisions other than the present case arising from 11 different jurisdictions that considered *Haslip* and affirmed punitive damage awards totaling $48,286,000, or almost $2,300,000 per case. *See* A31-32. In eleven of these decisions, the ratio between the punitive award and the actual compensatory award has equaled or exceeded 10:1, including 6 decisions in which the ratio ranged from between 260:1 and 750:1. In addition to the 21 cases in which punitive awards have been affirmed, there have been 4 cases, with total punitive awards of $9,500,000, that were remanded to the trial court for further consideration in light of *Haslip*, A33, and 4 cases in which the punitive award was remitted. A34. The original punitive awards in these four cases totaled $40,670,000, and were remitted to a total of $2,900,000.

Two cases since *Haslip* have held that an award of punitive damages violates due process. In *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), the court overturned two awards of punitive damages under South Carolina law in light of *Haslip*. *Mattison* involved two separate punitive awards of $50,000 each, with compensatory damages in one case of $100,000 and compensatory damages in the other case of $25,000. In *Alexander and Alexander, Inc. v. Evander & Associates, Inc.*, 596 A.2d 687 (Md. Ct. Spec. App. 1991), the court reversed an award of $12,500,000 in punitive damages in connection with a compensatory award of $250,000.

Thus, in only 10 months since *Haslip* was decided, there have been at least 32 reported decisions addressing due process challenges to punitive damage awards totaling more than $111,000,000. The average size of these punitive awards continues to be large, and juries in numerous jurisdictions continue to award punitive damages that exceed the actual damages awarded by a multiple of several hundred. There is no way to determine the additional amounts of punitive damages that have been awarded since *Haslip* that did not result in reported decisions, either because of settlement, bankruptcy, lack of financial incentive to appeal, or other factors. For whatever reasons, the *Haslip* decision has done nothing to slow the avalanche of punitive damage awards that continue to plague the appellate courts of this country.

Part of the reason for this continued onslaught of punitive awards must be that although the *Haslip* decision recognizes that due process limitations exist on jury discretion in punitive damage awards, the decision does not inform the lower courts of what those limits may be. *Haslip* upheld the punitive award on the facts before it, but does not give any guidance on the relationship between the *Haslip* facts and the minimum standards required by due process. As expressed by a California appellate court in *George v. International Society for Krishna Consciousness*, Cal. Rptr. 2d , 1992 WL 13838, at *34 (Cal. App. 1992), "[o]ther than explaining that Alabama's

procedure passes constitutional muster, *Haslip* offers little guidance as to what would be necessary to render a different system unconstitutional."

Even those objective criteria that *Haslip* identified under Alabama law are not being followed by the lower courts. Although the *Haslip* decision required that punitive damages "have some understandable relationship to compensatory damages," 111 S. Ct. at 1045, and although this Court stated that a punitive award that is more than four times the amount of compensatory damages "may be close to the line," *id.* at 1046, of unreasonableness, the lower courts do not feel compelled to require a relationship between punitive and actual damages. This attitude is best expressed by the Georgia Supreme Court in *Hospital Authority v. Jones*, 409 S.E.2d 501 (Ga. 1991), which affirmed a punitive award that was 260 times the actual damages awarded and justified this range by stating that "[w]hile the Supreme Court in *Haslip* analyzed the punitive damages award by comparing it to the actual award, nothing in the opinion mandates such a comparison." *Id.* at 503. Even the Alabama Supreme Court, which authored the decision that was affirmed in *Haslip*, has decided not to require a reasonable relationship between punitive and actual damages. In *Southern Life and Health Insurance Company v. Turner*, 586 S.E.2d 854, 858 (Ala. 1991), the court asserted that "[w]e have repeatedly held that punitive damages need not necessarily bear any particular relationship to compensatory damages," *quoting Nationwide Mutual Insurance Co. v. Clay*, 525 So.2d 1339, 1344 (Ala. 1987).

A distinct but equally important problem that *Haslip* does not address is the amount of post-verdict review of a punitive award that can be undertaken by a federal court sitting in diversity. The *Haslip* decision relied heavily upon the extensive degree of post-verdict review required under Alabama law, both by the trial court and the appellate courts. However, the deferential standards of post-verdict review under Fed. R. Civ. P. 50(b) and Rule 59, as well as the Seventh Amendment guarantee to trial by jury, severely limit the ability of a federal court to conduct the

type of review approved in *Haslip*. Thus, even well-intentioned federal courts that try to follow *Haslip* may not be able to do so under the federal procedural rules. *See Mattison v. Dallas Carrier Corp.*, 947 F.2d at 95.

Haslip unequivocally recognized that due process imposes significant restrictions upon a jury's discretion in awarding punitive damages, but the lower courts do not seem able to formulate any coherent understanding of what those limitations are. Indeed, a review of the opinions interpreting *Haslip* over just the last several months shows that the effect of this Court's decision has been little more than to lend this Court's imprimatur to punitive damage awards that are the result of unbridled jury discretion. This Court must intervene not only to preserve the due process limitations upon jury discretion in awarding punitive damages, but to give some substance as to what those limitations are.

B. THE TEXAS SYSTEM OF PUNITIVE DAMAGES DOES NOT SATISFY THE REQUIREMENTS OF DUE PROCESS RECOGNIZED IN *HASLIP*

In *Haslip*, this Court distinguished between the Alabama system for the imposition of review of punitive damages and other schemes that allow punitive damage awards to be set aside only if the award was grossly excessive or was based upon passion, bias or prejudice so as to shock the conscience. 111 S. Ct. at 1045 n.10. Those other schemes, which had been the source of some concern among members of this Court prior to *Haslip*, provide no objective limits on the jury's discretion in imposing punitive damages and give reviewing courts no meaningful tools to analyze an award of exemplary damages. A critical and honest analysis of the Texas system of punitive damages and, in particular, of the way in which punitive damages were imposed in this case under Texas law, reveals the precise constitutional inadequacies that were criticized in *Haslip*.

The jury instruction given in *Haslip* accommodated the defendant's interest in rational decisionmaking and the state's

interest in meaningful, individualized assessment of appropriate deterrence and retribution. The *Haslip* jurors were instructed that the purpose of punitive damages was "not to compensate the plaintiff for any injury" but "to punish the defendant" and for "the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future." The jurors also were instructed that they "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." 111 S. Ct. at 1037 n.1. Thus, although the *Haslip* instruction gave the jury significant discretion in its determination of punitive damages, that discretion was directed toward the expressed state goals of deterrence and retribution. The jury was instructed concerning the factors that it should take into consideration and was prevented from considering the wealth of the defendant. *Id.* at 1044.

In the present case, the jury was instructed as follows:

> If you find for the Plaintiffs and if you further find that the Defendant did act with malice, willfulness, intentionally or with heedless and reckless disregard and indifference to the rights of others, the law would allow you in your discretion to assess punitive damages against the Defendant as punishment and as a deterrent to others.
>
> In making your determination as to punitive damages you will consider the totality of the circumstances, and you may consider the financial resources of the Defendant in fixing the amount of such damages.

A35. Rather than attempting to focus the jury's discretion on objective criteria, the instruction given in this case was an appeal to its unfettered discretion by instructing it to consider the totality of the circumstances. The only objective factor mentioned to the jury was the defendant's net worth. Although the instruction included a brief reference to punishment and deterrence, the jury was in no way instructed to assess punitive damages with those goals in mind. The jury instruction was probably correct as a matter of Texas substantive law. The

instruction is substantially similar to the pattern jury charge recommended in Texas for punitive damages. *See* Texas Pattern Jury Charge 7.06 (State Bar of Texas, 1989). Consideration of a defendant's wealth is permissible in awarding punitive damages under Texas law. *Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988).

However, the constitutional conflicts between the instruction approved in *Haslip* and the instruction given in the present case are obvious and overwhelming. The only objective factor recommended to the jury was the defendant's net worth, and the jury was encouraged to consider all other "circumstances," without definition or limitation. The Eighth Circuit has remanded a case with an instruction almost identical to the one in this case because of due process concerns. *Union National Bank v. Mosbacher*, 933 F.2d 1440, 1448 (8th Cir. 1991).

Nor was the defective jury instruction cured by the Texas scheme for post-verdict review of punitive damage awards, which is illusory at best. The Alabama system of judicial review endorsed in *Haslip* provided for review both by the trial court and by the Alabama Supreme Court under specific criteria identified in Alabama Supreme Court decisions. Among other factors, reviewing courts are to consider whether there is a reasonable relationship between the punitive damages awarded and the harm that resulted from the conduct that gave rise to the punitive award, the nature and frequency of the defendant's conduct, and the existence of other civil awards against the defendant for the same conduct. 111 S.Ct. at 1045. These post-verdict requirements have a "real effect when applied by the Alabama Supreme Court to jury awards" and result in the reduction of excessive punitive awards. *Id.* In endorsing the Alabama system, this Court concluded that the application of the Alabama standards "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages" because, in part, "the fact finder must be guided by more than the defendant's net worth." *Id.*

The Texas scheme for the award and review of punitive damages is based upon the principle that the amount of punitive

damages to be awarded rests in the sound discretion of the jury. *Southwestern Investment Company v. Neeley*, 452 S.W.2d 705, 708 (Tex. 1970); *Tynberg v. Cohen*, 13 S.W. 315 (Tex. 1890); *Texaco, Inc. v. Pennzoil*, 729 S.W.2d 768, 865 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e).[2] Although Texas does follow the general rule that exemplary damages must be "proportional" to actual damages, this does not mean that there must be an exact ratio between the two elements of damages. *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1377 (5th Cir. 1982). In fact, the Texas Supreme Court has stated that the requirement of a reasonable relationship between actual and punitive damages "is merely a tool to aid the courts in determining when an exemplary damage award is the product of 'passion rather than reason.' " *Wright v. Gifford-Hill & Company, Inc.*, 725 S.W.2d 712, 714 (Tex. 1987), *quoting Tynberg v. Cohen*, 13 S.W.2d 315, 316 (1890). Thus, the real rule of law in Texas is that punitive damages are left to the discretion of the jury and will not be set aside unless the award is so large as to indicate that it is the result of passion, prejudice, or corruption, or that the evidence has been disregarded. *Tynberg v. Cohen*, 13 S.W.2d at 315; *Capital Title Co. v. Donaldson*, 739 S.W.2d at 392.

Texas courts have purported to adopt a series of five factors that a trial court and a court of appeals are to consider when evaluating whether a punitive damage award is proportionally excessive. These factors include the nature of the wrong, the character of the conduct involved, the degree of culpability of the wrongdoer, the situation and sensibilities of the parties, and the extent to which the defendant's conduct offends the public sense of justice and propriety. *Hanson v. Johns-Manville Products Corp.*, 734 F.2d 1036, 1047 (5th Cir. 1987); *Tatum v. Preston*

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2 Texas has adopted a statutory limitation on exemplary damages that did not apply to the trial of this action because the action was commenced before the effective date of the statute. *See* Tex. Civ. Prac. & Rem. Code § 41.007. Nothing in the statutory revision affects the discretion with which a jury may act, nor does it address the constitutional propriety of repeated punitive damage awards for the same course of conduct, one of the arguments raised by Celotex in this case.

Carter Co., 702 S.W.2d 186, 188 (Tex. 1986); *Alamo National Bank v. Kraus*, 616 S.W.2d at 910. These vague factors may sound lofty and impressive, but there is no indication that they work in practice. Punitive damage awards of Texas juries are very seldom reduced by either a trial court or an appellate court unless the compensatory damages awarded the plaintiff are reduced.

Another crucial distinction of Texas law is that the factual determination of the excessiveness of punitive damages is a question of fact over which the Texas Supreme Court has no jurisdiction. *Tatum v. Preston Carter Co.*, 702 S.W.2d at 188; *Alamo National Bank v. Kraus*, 616 S.W.2d at 910; *Southwestern Investment Co. v. Neeley*, 452 S.W.2d at 708. Although the Supreme Court does have the jurisdiction to determine whether the court of appeals applied an erroneous standard in determining the excessiveness of damages, there is no effective review by the Texas Supreme Court of the factual adequacy or excessiveness of punitive damage awards.

In contrast to Alabama law, Texas law does not require a reviewing court to consider the defendant's financial condition; the defendant's net worth is used solely as a factor for the jury to consider in Texas. Nor does Texas law provide a method by which a jury, a trial court, or a court of appeals can consider the frequency or size of other punitive damage awards against a defendant for the same conduct as that in the case under review as a basis for mitigation. The question of multiple punitive damage awards is becoming more and more crucial in toxic tort litigation as well as other areas of law, and this Court has never considered the constitutionality of serial awards of punitive damages against the same defendant for a single course of conduct.

The lack of objective and meaningful review standards under Texas law is brutally illustrated by the Fifth Circuit's consideration of the excessiveness of the punitive award in light of the decision in *State Farm Mutual Auto Insurance Company v. Zubiate*, 808 S.W.2d 590, 605 (Tex. App.—El Paso 1991, no

writ). In *Zubiate*, the trial court entered judgment, based upon a jury verdict, of $165,000 in actual damages and $15 million in punitive damages. On appeal, the court ordered a remittitur of $14,340,000 of the punitive award. Unfortunately, the court could offer no objective rationale for its decision under Texas law. The *Zubiate* court asked itself the question of why the punitive damage award was excessive and its only answer was "*[b]ecause it just is.*" 808 S.W.2d at 605 (emphasis in original). Chief Justice Osborn filed a concurring opinion in *Zubiate* that was even more candid because it admitted both that the jury's determination in awarding exemplary damages "is an arbitrary process without any objective standards" and that a jury's award of punitive damages is "not subject to objective analysis on appeal." 808 S.W.2d at 606. The Fifth Circuit in this case recognized the admissions made in *Zubiate* and also admitted "the inherent problems with the purely subjective Texas rule" of punitive damages. A17. Although the Fifth Circuit concluded that the various punitive damage awards in the present case, which range from seven to two hundred times the compensatory damages awarded, were not excessive, the court could offer no rational reasoning or facts to support its conclusion.

The decision in this case makes clear by omission what the *Zubiate* court expressed: that there are no objective standards under Texas law for either the imposition of punitive damage awards by a jury or the review of those awards by a trial or appellate court. Despite the occasional rhetoric of the Texas Supreme Court, the fact remains that Texas law provides no objective standards to limit the jury's discretion in awarding punitive damages or to guide a court's review of such an award.

C. THE LACK OF OBJECTIVE STANDARDS IN TEXAS LAW IS SHOWN BY THE LACK OF A REASONABLE RELATIONSHIP BETWEEN THE PUNITIVE DAMAGE AWARDS AND THE COMPENSATORY AWARDS IN THIS CASE

The lack of objective standards for the imposition of punitive damages under Texas law is most graphically demonstrated by analyzing the inconsistent ratios between punitive and actual damages in the various awards made in this single case. Out of the 11 plaintiffs who received punitive damage awards, 10 of them claimed to have been exposed to asbestos-containing products manufactured by Celotex or its predecessors while employed in various construction trades.[3] The jury heard exactly the same liability evidence against Celotex for all ten of these plaintiffs.

Texas law allegedly requires that exemplary damages be reasonably proportioned to actual damages. *Nebours v. Longview Savings and Loan Association*, 700 S.W.2d 901, 904 (Tex. 1985). Indeed, this may be the one objective standard Texas law purports to demand of punitive damage awards. But, despite the absence of distinguishing characteristics between the plaintiffs in this case, the ratios between the punitive and actual damages awards for the ten plaintiffs are 7:1, 8:1, 15:1, 16.7:1, 43:1, 48:1, 60:1, 66.7:1, 75:1, and 200:1. Given that the punitive evidence did not vary from plaintiff to plaintiff, how can punitive damage awards that were 60, 75, or 200 times the actual damages awarded be proportional if ratios of 7:1 and 8:1 are also proportional in the same case? This internal inconsistency between the ratios must lead to the conclusion that a single jury, reviewing a single set of evidence, and faced with 10 plaintiffs whose relationships with Celotex were all similar, arbitrarily awarded an amount of punitive damage for each plaintiff that bore no relationship to the actual damages awarded to those plaintiffs.

The Fifth Circuit was obviously troubled by these varying awards. Despite these misgivings, the Fifth Circuit could find no

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3 The 11th plaintiff claimed to have been exposed to asbestos fibers when she cleaned clothes for her husband, one of the other plaintiffs in this case.

rule under Texas law that prevented such a range of punitive damage ratios. Given the vague and subjective standards identified by Texas courts for the review of punitive damage awards, there may be no objective standard under Texas law which would invalidate these inconsistent awards. It is precisely this type of unrestrained discretion that caused this Court in *Haslip* to recognize that due process requires objective criteria for both the imposition and judicial review of punitive damage awards. Those criteria do not exist under Texas law and were not provided to Celotex in this case.

II. THIS COURT SHOULD GRANT THE WRIT TO CONFIRM THE DUE PROCESS LIMITATIONS ON MULTIPLE AWARDS OF PUNITIVE DAMAGES AGAINST A PARTY FOR A SINGLE COURSE OF CONDUCT

As this Court has held on numerous occasions, punitive damages are not intended to compensate an injured plaintiff, but rather are intended to punish the defendant and deter him and others from similarly extreme conduct. *City of Newport v. Fact Concerts*, 453 U.S. 247, 266-67 (1981); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Although early cases seem to allow a jury to award punitive damages as quasi-compensation for elements of damages not then allowed by law or considered too remote, *see, e.g., Cole v. Tucker*, 6 Tex. 133 (1851); *Wright Titus, Inc. v. Swafford*, 133 S.W.2d 287, 295 (Tex. Civ. App.—Austin 1939, writ dism'd judgmt cor.); *Wilkes v. Wood*, 1 Lofft 1, 98 Eng. Rep. 489 (1763), the modern law of tort damages allows recovery for many once-rejected damage elements, rendering any quasi-compensatory element of punitive damages unnecessary and illogical. *See generally, Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981); *Ricard v. State*, 390 So.2d 882, 885-886 (La. 1980).[4]

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4 In *The Celotex Corporation v. Tate*, 797 S.W.2d 197, 209 (Tex. App. —Corpus Christi 1990, no writ), an intermediate Texas appellate court cited to a Texas Supreme Court decision, *Hofer v. Lavender*, 679 S.W.2d 470 (Tex.

Although punishment and deterrence may be accomplished by an appropriate award of punitive damages in an individual case, the whole notion of punitive damages loses any rational purpose in the context of mass tort liability such as is presented by the case now before this Court. Concern over the devastating potential effects of multiple punitive damage awards in a mass tort context led Judge Henry Friendly to pen these sadly accurate words in 1967:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering .... We have the greatest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967).

The concerns expressed by Judge Friendly in *Roginsky* were echoed by Chief Judge Charles Clark of the Fifth Circuit:

> The grave reality of the need to maintain viable enterprises to meet future [asbestos] compensation liabilities to already injured persons and those with latent diseases commands consideration of the whole picture rather than a myopic, mechanical analysis that would look to this cause of action alone and deny that there exist tens of thousands of others, and the potential for many times more.
>
> In the extraordinary circumstances in which [asbestos] litigation is set, the allowance of punitive damages is incompatible with and would disrupt the viability of the

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1984), in support of the proposition that the quasi-compensatory purpose of punitive damages still had some viability. However, Texas Supreme Court cases subsequent to *Hofer* have continued to articulate the dual purpose of punitive damages as being punishment and deterrence, without reference to any quasi-compensatory purpose. *See, e.g., Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985). *Tate* conflicts with those decisions of the Texas Supreme Court and does not correctly state Texas law.

> strict liability cause of action. Moreover, the basic policy objectives of punitive damages are satisfied in this instance by defendant's multiple exposure to compensatory damages. Therefore, punitive damages are inappropriate in these extraordinary circumstances.

Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 524-25 (5th Cir. 1984), *reversed*, 750 F.2d 1314 (5th Cir. 1985) (*en banc*), *modified*, 781 F.2d 394 (5th Cir. 1986) (*en banc*). While neither *Roginsky* nor *Jackson* was decided on due process grounds, both cases reflect proper discomfort with punitive damages being awarded hundreds or even thousands of times against a single defendant for a single course of conduct.

The twin aims of punitive damages—punishment and deterrence—are not served by repetitive awards of punitive damages in mass tort litigation. These goals, while legitimate and rational in theory, lose their legitimacy and rationality, and thereby conflict with due process under the facts presented in this case. As the record in the district court indicates, Celotex has been subjected to tens of thousands of asbestos-related lawsuits, has been adjudged liable for tens of millions of dollars in actual damages, tens of millions of dollars in punitive damages, and by August 31, 1988 had disposed of 27,000 cases at a cost of $250,000,000.00. It is difficult to rationally believe that the additional assessment of $6,100,000 in punitive damages, as determined by the jury in this case, would, in any practical sense, be a rational and just punishment.[5]

The deterrence element of the punitive award is even less grounded in a rational purpose in the context of asbestos litigation. Celotex no longer manufactures any asbestos-containing products. Its predecessor's principal asbestos-containing insulation product became asbestos-free nearly

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5 Celotex filed a Chapter 11 petition in bankruptcy on October 12, 1990. By that time, punitive damages had been awarded against Celotex in asbestos-related personal injury and wrongful death cases totaling more than $35,000,000 in favor of at least 96 plaintiffs. A40-47. Celotex sought leave to present this information to the court below, A36-46, but leave was denied. A47.

twenty-three years ago. Warning labels were placed on all asbestos-containing products made by Celotex nearly twenty years ago. Celotex stopped production of its last asbestos-containing product, a roofing material, in 1984, and has neither made nor sold asbestos-containing products since that time. Finally, legislative and regulatory steps have been taken which completely accomplish regulatory goals in this area. While asbestos has been regulated by federal and state governments for many years,[6] regulations have become more restrictive in recent years. In 1975, the federal government announced a partial ban on asbestos, which applied to certain consumer products. 40 Fed. Reg. 48,292 (1975). In 1990, the Environmental Protection Agency promulgated a total ban on the use of asbestos in certain materials. *See* 40 C.F.R. § 61.150 (1990).

The United States District Court for the District of New Jersey, in *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, *modified*, 718 F. Supp. 1233 (D.N.J. 1989), picked up where *Roginsky* and *Jackson I* left off, but addressed itself to the problem in due process terms. The *Juzwin* court stated:

> Due process requires more than simply the provision of a judicial proceeding. It requires that any such proceeding be fundamentally fair, and this court concludes that subjecting [asbestos] defendants to the possibility of multiple awards of punitive damages for the single course of conduct alleged in this action would deprive defendants of the fundamental fairness required by the Due Process Clause. . . .
>
> [T]he court holds that due process places a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct. Regardless of whether a sanction is labelled "civil" or "criminal" in nature, it cannot be tolerated under the requirements of due process if it amounts to unrestricted punishment.

705 F. Supp. at 1064-1065.

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6 *See Lorenz v. The Celotex Corporation*, 896 F.2d 148 (5th Cir. 1990).

Juzwin in turn relied on earlier precedent which called into question the wisdom of serial awards of punitive damages in mass tort litigation. *See In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), *cert. denied sub nom. The Celotex Corporation v. School District*, 479 U.S. 852 (1986); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied sub nom. Stover v. Rau*, 459 U.S. 988 (1982); *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must, therefore, be a limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."); *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 526 F. Supp. 887, 899 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom. A. H. Robins Co. v. Abed*, 459 U.S. 1171 (1983) ("A defendant has a due process right to be protected against unlimited multiple punishment for the same act. A defendant in a civil action has a right to be protected against double recoveries not because they violate 'double jeopardy' but simply because overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process.")

Both because of the realities of tens of thousands of damage lawsuits with their collective millions of dollars in compensatory and prior punitive awards, and because of strict government regulation of this field, no rational purpose is served by the district court's award of punitive damages in this case.

CONCLUSION

More than 100 years ago, the Texas Supreme Court recognized that a

> power such as may be exercised by juries in awarding exemplary damages is liable to great abuse, —may often lead to great oppression; and there is no class of cases in which the conservatism of the judge should more frequently find field for action.

Tynberg v. Cohen, 13 S.W. 315, 317 (Tex. 1890). The conservatism counseled in *Tynberg* has long since vanished, and punitive damages have become a crippling problem in this country. In *Pacific Mutual v. Haslip*, this Court finally addressed the problem of punitive damage awards that have "run wild" and recognized that due process imposes limits on a jury's discretion to impose punitive damages. *Haslip* reviewed the numerous safeguards incorporated into Alabama law, found them fair and objective, and still could only conclude that the award of punitive damages in *Haslip* that was slightly more than four times the amount of compensatory damages was "close to the line." 111 S. Ct. at 1046. It was only after "careful consideration" that this Court in *Haslip* found the Alabama procedures constitutionally valid. *Id.* If the Alabama procedures found acceptable in *Haslip* represent an approach to the constitutional line of legitimacy, the Texas procedure employed in this case is a frivolous leap over that line into a limitless vacuum of unfettered jury discretion with no adequate method of review. The reasons which form the basis of this Court's decision in *Haslip* require that the award of punitive damages in this case be invalidated.

Since the decision in *Haslip*, the lower courts in both the state and federal systems have struggled with the limitations imposed by due process, but have not been able to reach any rational consensus about what those limits are. This case, decided under Texas law, and with dramatically varying punitive damage ratios within a series of awards in a single case, presents a unique opportunity for this Court to give substance to the limitations suggested in *Haslip*. This Court should grant the writ of certiorari in this case to assist the lower courts in their application of the *Haslip* principles.

This case also presents an opportunity for the Court to consider the limitations due process may impose upon repeated awards of punitive damages against a single defendant for a single course of conduct.

Celotex, therefore, asks that the judgment against it be modified to deny any recovery for punitive damages or, alternatively, that the judgment be vacated and the cause remanded for further proceedings.

Respectfully submitted,

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THE CELOTEX CORPORATION

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 90-4095

WILLIAM EARL GLASSCOCK, CHARLES A. REICH, GARY N. STARKEY, LINA R. STARKEY, GUS GEISLER, SR., LENA GEISLER, MALVIN R. LANE, NANCY S. LANE, CARLOS G. GONZALEZ, DELIA S. GONZALEZ, WILLIAM E. SMITH, SANDRA SMITH, JAMES W. PHILLIPS, BARBARA E. PHILLIPS, ROY B. GHENT, LOIS T. GHENT, CHARLES MARSH, and LEETA FAY MARSH,

Plaintiffs-Appellees,

versus

ARMSTRONG CORK CO., ET AL.,

Defendants,

THE CELOTEX CORP.,

Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Texas

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(OCTOBER 24, 1991)

Before CLARK, Chief Judge, WILLIAMS and DAVIS, Circuit Judges, JERRE S. WILLIAMS, Circuit Judge:

The Celotex Corporation appeals a jury verdict awarding compensatory and punitive damages to eighteen plaintiffs for injuries caused by exposure to Celotex's asbestos-containing

products. Celotex directs its primary challenge toward the amount of punitive damages assessed by the jury. The claim is that the damage awards are excessive and violate provisions of the United States and Texas Constitutions. Celotex also contends that the award of compensatory damages to some of the plaintiffs was in error. After a thorough evaluation of the record, we affirm the jury verdict in full.

Facts

Celotex is a manufacturer of building products, including roofing materials, wallboard, and certain forms of insulation. Celotex entered the insulation business in 1972 by acquiring the assets of the Panacon Corporation. Panacon was the successor in interest to the Philip Carey Manufacturing Company. Some of the products manufactured by Philip Carey contained asbestos. Panacon and later Celotex continued the production and distribution of asbestos-containing products originally manufactured by Philip Carey.

Insulation installers and their spouses brought products liability actions, asserting failure to warn, in the district court. The suits were against Celotex and several other defendants. The district court consolidated these individual actions. Ten of the plaintiffs worked in the asbestos industry and claimed injuries from their exposure to defendants' products. The spouses of eight of these workers were also plaintiffs, seeking damages for loss of consortium. In addition, one of the spouses claimed injuries from exposure to asbestos fibers carried home on her husband's clothing.

Before trial, the parties allowed defendant Johns-Manville Manufacturing Company to sever its action from the primary suit. During trial, all of the remaining defendants except Celotex settled with the plaintiffs. The jury then returned a verdict finding Celotex strictly liable for the plaintiffs' injuries. The jury concluded that (1) each of the plaintiffs who had been exposed to asbestos had suffered an asbestos-related injury, (2) Celotex's

products were a producing cause of the injuries, and (3) the products were defective and unreasonably dangerous because Celotex failed to warn the plaintiffs of the potential dangers of prolonged exposure to asbestos.

The district court submitted special interrogatories on damages to the jury. The interrogatories asked the jury to assess the actual damages suffered by each plaintiff, and to apportion damages among the defendants. Although only Celotex remained as a defendant at this point, all defendants except Johns-Manville were listed in the interrogatories as subject to the apportionment. Separate interrogatories asked the jury to determine whether the plaintiffs should receive punitive damages from Celotex for its contribution to the plaintiffs' injuries and, if so, the appropriate amount of punitive damages for each plaintiff.

The jury awarded a total of $2,590,000 in actual damages against all of the defendants. Celotex was found responsible for approximately $317,625 of the total damage award. The jury also awarded eleven plaintiffs a total of $6,100,000 in punitive damages against Celotex.

Celotex appeals, alleging in part that (1) there was insufficient evidence to support actual damage awards for loss of consortium and loss of past earning capacity, (2) the applicable statute of limitations barred the claims of two of the plaintiffs, (3) punitive damages should not have been awarded or, alternatively, (4) the punitive damage award was excessive and in violation of Texas law and the United States Constitution.

I. Compensatory Damage Awards

Celotex challenges the compensatory damage awards found by the jury. Celotex argues that the evidence did not support most of the loss of consortium awards, and some of the awards for loss of earning capacity in the past. Celotex also argues that the statute of limitations barred the claims of two of the plaintiffs. After carefully reviewing the record, we uphold the compensatory damages awarded by the jury.

A. Loss of Consortium

Nine of the plaintiffs alleged loss of consortium as a result of their spouse's exposure to asbestos.[1] The jury awarded $25,000 to each of these plaintiffs. Celotex moved for judgment notwithstanding the verdict (JNOV), claiming that the plaintiffs failed to offer any testimony to support awards for loss of consortium. The district court denied Celotex's motion.

We properly apply a highly deferential standard of review to a district court's decision denying a JNOV motion. We reverse only if a reasonable and fair-minded jury could not arrive at its verdict after considering the evidence. *See Brown v. Arlen Management Corp.*, 663 F.2d 575, 581 (5th Cir. Dec. 1981), *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). On appeal, Celotex challenges the loss of consortium damages awarded to eight of the nine spouses. Celotex does not contest the damages awarded to plaintiff Barbara Phillips, apparently conceding the sufficiency of the evidence to support her award for loss of consortium.

Texas first recognized an action for loss of a spouse's consortium in *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978). The Texas Supreme Court defined loss of consortium as the loss of companionship, emotional support, love, felicity, and sexual relations necessary to a successful marriage. *Id.* at 666. The court recognized the difficulty in translating the subjective nature of this loss into monetary terms, but it trusted the ability of the jury to calculate an appropriate award based on the evidence. *P.T.& E. Co. v. Beasley*, 698 S.W.2d 190, 196 (Tex. Civ. App. 1985).

The problem here, according to Celotex, is that eight of the plaintiffs failed to offer *any* evidence which would allow the jury to find loss of consortium. But after reviewing the record, we

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1 Seven of these plaintiffs were spouses of insulators and sought damages only for loss of consortium. Plaintiff Lois Ghent sought damages for exposure to asbestos fibers carried into her home by her husband, and for loss of her husband's consortium. Her husband, Roy Ghent, asked for loss of consortium damages due to his wife's exposure to asbestos.

agree with plaintiffs that the evidence supports all of the damage awards for loss of consortium.

Celotex correctly argues that there is little if any direct evidence of the effect asbestos-related injuries had on the plaintiffs' respective marriages. For the most part, plaintiffs did not provide specific examples of how their spouses' injuries translated into a loss of consortium. Appropriate evidence of loss of consortium includes proof of (1) the nature of the marital relationship prior to the spouse's injury, (2) the deterioration of the marital relationship following the injury, and (3) the extent and duration of the spouse's injuries. *See, Whittlesey*, 572 S.W.2d at 667; *Monsanto Co. v. Johnson*, 675 S.W.2d 305, 312 (Tex. Civ. App. 1984).

With the exception of questions directed to plaintiffs Barbara Phillips, Leeta Marsh, and possibly Nancy Lane, counsel did not attempt to elicit this type of testimony from the loss of consortium plaintiffs. Generally, the testimony simply affirmed that spouses suffered symptoms of asbestos exposure. An excerpt from the testimony of plaintiff Linda Starkey is representative of the testimony given by most of the spouses:

> Q: Mrs. Starkey, let me get right down to the business. As you look back and think about it, how did your husband's shortness of breath and the condition he's complaining about that you just heard him testify about, how did it come on him?
>
> A: He began to have some shortness of breath and he began to tire more easily. And he's always been a very active person, not only at work, but when he got home from work. And I noticed that he had started to slow down on some things that he was doing. Then we talked about it and he decided it would probably be a good idea to go see someone about it.

We do not conclude, however, that the absence of direct evidence of a detrimental impact on the marriage relationship prevents plaintiffs from recovering damages for loss of consortium.

During the course of the trial, each husband plaintiff claiming direct injuries as a result of asbestos exposure testified in varying degrees of detail about his work history and exposure to Celotex's products. These plaintiffs also testified about physical complaints and limitations on their activities allegedly resulting from their exposure to asbestos. Each of these plaintiffs indicated that he had trouble breathing and sleeping, and that shortness of breath made it difficult for him to accomplish simple tasks. Plaintiffs also offered a substantial amount of expert testimony establishing the long term effects of exposure to asbestos. This testimony indicated that each of the plaintiffs exposed to asbestos had or would contract asbestosis. Further testimony detailed the physical debilitation caused by asbestosis, and described future ailments that would result from the disease.

We conclude that the evidence in the record was sufficient to satisfy the burden of proof of a loss of consortium. Loss of consortium damages may be inferred from evidence showing the nature and extent of a spouse's injuries. *See Cornelison v. Aggregate Haulers, Inc.*, 777 S.W.2d 542, 549 (Tex. Civ. App. 1989).[2] A reasonable inference from the evidence presented in this case is that each of the plaintiffs suffered a loss of affection, solace, comfort, companionship, society, assistance, or sexual relations as a result of their spouse's exposure to Celotex's products. *See P.T.& E. Co. v. Beasley, supra.* The jury could conclude from the evidence that asbestos-related injuries of a spouse must have resulted or would result in a measure of loss of consortium for each of the plaintiffs. We do not disturb the loss of consortium damages awarded by the jury.

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2 Although we do not find a Texas case directly considering this proposition, the established rule does permit loss of consortium damages upon proof of the severity of a spouse's injuries. *E.g., Williams v. Ryder Truck Lines, Inc.*, 489 F.Supp. 430, 432 (E.D.Tenn. 1979) (applying Tennessee law), *Stauffer Chemical Co. v. Buckalew*, 456 So.2d 778, 783 (Ala. 1984). *See also* Annotation, *Excessiveness or Adequacy of Damages Awarded for Noneconomic Loss Caused by Personnel Injury or Death of Spouse*, 61 A.L.R.4th 309, 318-19 (1988).

B. Loss of Earning Capacity in the Past

The district court provided special interrogatories to aid the jury in its compensatory damage calculation for each plaintiff. These interrogatories listed the various elements of damages the jury could consider, and included loss of earning capacity as an appropriate component of the damage award. The interrogatories subdivided loss of earning capacity into two separate elements: loss of earning capacity in the past and loss of earning capacity in the future. An award for loss of earning capacity in the past would compensate plaintiffs for the actual loss of earning capacity they had already experienced as a result of their asbestos-related injuries. Loss of earning capacity in the future would compensate plaintiffs for their anticipated loss of earning capacity.

Celotex claims that the district court should not have allowed the jury to assess damages for loss of earning capacity in the past for five of the plaintiffs. Celotex argues that in this case the evidence was not sufficient to permit the jury to award damages for loss of earning capacity in the past for plaintiffs William E. Smith, Gus Geisler, Gary N. Starkey, Charles Marsh, or Carlos G. Gonzalez. Celotex does not challenge the sufficiency of the evidence to support an award for loss of earning capacity in the future. We apply the same deferential standard of review to this element of damages that we did when considering the sufficiency of evidence challenge to the loss of consortium awards.

Loss of earning capacity is an appropriate element of damages under Texas law. *See, e.g., McIver v. Gloria*, 169 S.W.2d 710, 712 (Tex. 1943). Recovery of damages for loss of earning capacity compensates a plaintiff for the difference between the income he could earn before his injury and the income he could earn after the injury. *Port Terminal R. Ass'n v. Sims*, 671 S.W.2d 575, 578 (Tex. Civ. App. 1984), *cert. denied*, 471 U.S. 1016, 105 S.Ct. 2021, 85 L.Ed.2d 302 (1985). The interrogatories in this case asked only for a global compensatory damage figure. Since the court did not require the jury to provide a separate figure for each

element of damages, we do not know the precise amount of damages for loss of earning capacity in the past awarded to each plaintiff.

Celotex concedes that a plaintiff can prove loss of earning capacity in the past by introducing evidence of his earnings prior to injury and of the extent of his disability. *Retzlaff v. Ground*, 640 S.W.2d 676, 677 (Tex. Civ. App. 1982); *see also Exxon Corp. v. Shuttlesworth*, 800 S.W.2d 902, 905-06 (Tex. Civ. App. 1990). Plaintiffs offered substantial evidence of the nature and extent of their asbestos-related injuries. Celotex claims that the plaintiffs failed to offer sufficient evidence of their earnings or earning capacity to permit a jury to assess damages for loss of earning capacity in the past. In light of the evidence in the record, we conclude that Celotex's argument is frivolous.

Celotex had the employment history of each plaintiff entered into the record. These employment histories listed dates and places of employment for each of the plaintiffs, and included the wages earned in each job.[3] Without more, these work histories provided sufficient evidence of the plaintiffs' past earnings and earning capacity. Coupled with the testimony detailing the plaintiffs' injuries, we think that a jury could award damages to each plaintiff for loss [sic] earning capacity in the past based on this evidence.

Our review of the trial transcript reveals additional information that the jury could rely upon in assessing these damages. Celotex correctly claims that plaintiffs Gonzalez, Geisler, and Smith did not offer any testimony concerning their past earnings. Celotex incorrectly makes this same claim for plaintiffs Starkey and Marsh. Plaintiff Starkey testified in part that as an insulator he "made anywhere from three dollars an hour to fifteen over the years as the wages increased," and that in his best year he made $50,000. Plaintiff Marsh testified that he made $5,000 a year

3 The information provided by appellant Charles Marsh is substantially less complete than the work histories provided by the remaining plaintiffs.

doing roofing jobs using asbestos products, and that shortness of breath prevented him from continuing to do these jobs. Celotex has absolutely no basis for arguing that the evidence was insufficient to permit awards for loss of earning capacity in the past to plaintiffs Starkey and Marsh.

We also find that the jury could rely on the testimony of other plaintiffs to ascertain the loss of earning capacity in the past for plaintiffs Geisler, Gonzalez, and Smith. All of the plaintiffs involved in these consolidated cases installed asbestos insulation and other asbestos-containing building products. Their employment was substantially similar, and they suffered the same type of injuries. Plaintiffs' counsel informed the district court that he planned to elicit detailed testimony from plaintiffs Phillips and Lane about the nature of their work and patterns of advancement in the field, and that he intended to abbreviate his examination concerning these same topics with the remaining plaintiffs. Celotex did not object to this plan. These two plaintiffs offered extensive testimony concerning the nature of their employment and the customary wage rates, salary scales, and prospects of promotion. The remaining plaintiffs indicated that their employment was similar to that described by the first two plaintiffs.

We hold that the evidence presented was sufficient to allow a jury to award damages for loss of earning capacity to each of the plaintiffs. Armed with the individual work histories and the information elicited from the plaintiffs a jury could reasonably conclude that all of the plaintiffs suffered some loss of earning power due to their injuries. The district court did not err by including loss of earning capacity in the past as an appropriate element of damages for each of these plaintiffs.

C. Statute of Limitations

Celotex contends that two of the plaintiffs, Roy Ghent and his wife Lois, failed to institute their action within the period prescribed by the applicable statute of limitations. The district

court denied Celotex's motion for a directed verdict, and permitted the Ghents to pursue their claims. The court also refused to submit the question to the jury.

The Ghents filed their action in July 1987. The parties agree that in Texas a two year statute of limitations controls this products liability action. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.003. Texas has adopted a discovery rule for determining when a cause of action accrues for certain classes of cases. *See Gaddis v. Smith*, 417 S.W.2d 577 (Tex. 1967); *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988). The limitation period for a products liability action does not begin to run until a plaintiff discovers or should have discovered his injury and its cause in fact. *Mann v. A.H. Robins Co.*, 741 F.2d 79, 81 (5th Cir. 1984); *see also Woodruff v. A.H. Robins Co.*, 742 F.2d 228, 229 (5th Cir. 1984). The statute of limitations did not accrue in this case until Roy Ghent knew or should have known that his injuries resulted from exposure to asbestos.

Celotex argues that Roy Ghent knew that asbestos caused his condition as early as 1983, and that the statute of limitation began to run at that point. Ghent's medical records offered into evidence by Celotex contain a January 12, 1983 notation reading "history of asbestosis." Doctors testifying during trial indicated that the primary source of information for a medical history is the patient. Based on this evidence, Celotex asked the district court to conclude that Ghent knew he had asbestosis in 1983 because he told his doctor about the condition.

Celotex relies entirely on this one notation in Roy Ghent's file to support its argument for prescription. Celotex did not cross-examine Ghent concerning this notation, and it did not present any other testimony showing that Ghent knew he was suffering from asbestosis in 1983. Celotex did not offer evidence showing that Ghent's doctor discussed asbestosis with him in 1983 or that anyone in his doctor's office informed Ghent of the notation in his medical history. Ghent testified that he was not aware of his disease, the cause of his physical symptoms, until 1986. We agree

with the district court that the minimal evidence offered by Celotex was insufficient to support a directed verdict, and was not substantial enough to warrant submission of the limitations question to the jury. *See Boeing v. Shipman*, 411 F.2d at 374-75.

D. Johns-Manville

The jury found Celotex liable for $317,625 of the total compensatory damage award. Celotex claims that this figure is inflated because the court did not include one of the original defendants, Johns-Manville Sales Corporation, in the jury interrogatories. Before trial, the district court severed all claims against Johns-Manville, including Celotex's cross-claim for contribution. At trial, the district court refused to allow Celotex to introduce evidence of plaintiffs' exposure to Johns-Manville products. Celotex contends that the percentage causation attributed to its products by the jury is excessive because Johns-Manville was not included in the causation computation.

Texas law reduces a plaintiff's recovery and a defendant's liability in a strict liability action by the percentage of causation attributed to a settling tortfeasor. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 429 (Tex. 1984). The trier of fact assigns a percentage of causation for each of the settling defendants. The trier of fact can assess a settling party's percentage causation even if the settlor is not joined in the action. *Acord v. General Motors Corp.*, 669 S.W.2d 111, 117 (Tex. 1984). Adhering to these Texas rules, the jury interrogatories required the jury to assess a percentage causation for all of the settling defendants. Celotex's responsibility for payment of the compensatory damage award was reduced accordingly.

The question here is whether these Texas decisions required the district court to permit evidence concerning Johns-Manville products and to have the jury assess Johns-Manville's percentage causation for the plaintiffs' injuries. Unlike the other defendants, Johns-Manville was not a settling tortfeasor. By agreement of the

parties, the district court severed all claims against Johns-Manville from the primary action. A future proceeding will determine whether and to what extent Johns-Manville is responsible for the plaintiffs' injuries. If Johns-Manville is found liable, Celotex retains a right to seek contribution. By acquiescing to severance of Johns-Manville's action, Celotex agreed to await this future proceeding to recoup part of the damage award assessed by the jury. *See Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1140-41 (5th Cir. 1985). We hold that Texas law does not require a jury to assess a percentage causation against a defendant severed from the action prior to trial. The district court committed no error.

II. Punitive Damage Awards

The remainder of Celotex's appeal relates to the $6,100,000 punitive damage awards included in the jury's verdict. Celotex asks us to reverse the exemplary damage awards based on federal and state constitutional law, state statutory and common law, and on public policy grounds. Although the Supreme Court's recent decision in *Pacific Mutual Life Ins. Co. v. Haslip*, U.S. , 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) breathed a measure of new life into Celotex's procedural due process argument, we find no reason to upset the jury's verdict.

A. Gross Negligence and Causation

Celotex claims that the jury findings in this case were inadequate to support an award of punitive damages. Specifically, Celotex argues that the special interrogatories addressing exemplary damages did not require the jury to find a causal nexus between Celotex's acts and plaintiffs' injuries. Celotex asked the court to submit an issue to the jury on gross negligence and proximate cause. Celotex now claims that the court's refusal to submit this issue requires reversal of the jury's punitive damages findings.

Texas law permits the imposition of exemplary damages in strict liability actions involving failure to warn. *See International Armament Corp. v. King*, 674 S.W.2d 413, 416 (Tex. Civ. App.

1984), *aff'd*, 686 S.W.2d 595 (Tex. 1985); *Ford Motor Co. v. Nowak*, 638 S.W.2d 582,593 (Tex. Civ. App. 1982). To recover punitive damages in a products liability case in Texas, a plaintiff must prove "that the defendant was consciously, i.e., knowingly, indifferent to his rights, welfare, and safety." *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981). A finding of gross negligence will justify punitive damages, as will a finding of reckless, willful, or intentional indifference to the rights of others. *International Armament, supra.*

The special interrogatories in this case asked the jury whether "the Celotex Corporation (Philip Carey Manufacturing Company) [acted] willfully, intentionally, or with callous or reckless and heedless disregard and indifference to the rights and welfare" of the plaintiffs. The court defined "heedless and reckless disregard" in the instruction as "an entire want [sic] of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare, or safety of the persons affected by it."

The jury found that Celotex failed to warn the plaintiffs of the dangers of asbestos, and that this failure to warn was a producing cause of the plaintiffs' injuries. The jury further found that Celotex acted with conscious indifference to the rights of plaintiffs when it failed to warn them of the dangers of asbestos. These findings are sufficient to justify imposition of punitive damages.

As part of this same argument, Celotex claims that the district court's refusal to allow evidence of the utility of its products tainted the punitive damage awards. Celotex does not attempt to argue that evidence of a product's utility can shield it from liability in a failure to warn case. *See Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1088-89 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974). Instead, Celotex claims that the utility of its products was relevant to the jury's punitive damages computation. Celotex contends that a jury must consider all of the circumstances, including the utility of a product, before determining whether to assess punitive damages. We disagree.

Celotex had a duty to warn plaintiffs of the dangers of its products. The utility of the products did not relieve Celotex of this duty. The conscious indifference Celotex displayed in failing to issue these warnings permitted an award of punitive damages. Evidence of the utility of the asbestos-containing products was irrelevant to this determination and properly excluded by the district court.

B. Successor Corporation Liability

Celotex entered the insulation business by becoming the successor in interest to the Philip Carey Corporation in 1972. Plaintiffs' suit asked the district court to hold Celotex liable both for its own actions beginning in 1972, and for the actions of Philip Carey prior to the acquisition. Celotex argues that it should not be required to pay punitive damages for actions of a company over which it had no prior control. To hold Celotex liable in this situation, it urges, would not further either the deterrence or punishment policies supporting exemplary damages.

Celotex has raised the same argument in three recent cases before this Court. In *Aguirre v. Armstrong World Industries, Inc.*, 901 F.2d 1256, 1258 (5th Cir. 1990) we rejected the argument because Celotex failed to raise the issue in the district court. Since Celotex did not raise the issue below, the record did not contain sufficient evidence to decide Celotex's claim. Specifically, the record did not provide enough information to determine the sequence and types of transactions preceding Celotex's acquisition of Philip Carey's product line. Relying on *Aguirre*, we rejected the argument for the same reason in *King v. Armstrong World Industries, Inc.* 906 F.2d 1022, 1029 (5th Cir. 1990), *cert. denied,* U.S. , 111 S.Ct. 2236, 114 L.Ed.2d 428 (1991), and later in *Edwards v. Armstrong World Industries, Inc.*, 911 F.2d 1151, 1153 (5th Cir. 1990).

These decisions do not foreclose Celotex's argument because all three decisions relied upon the fact that Celotex failed to raise the issue in the district court and failed to develop a proper record to

permit us to review the issue. In this case, Celotex raised the issue in a motion for a directed verdict and received a ruling from the district court. In addition, plaintiffs requested and received an instructed verdict finding Celotex liable as Philip Carey's successor. To support their motion, plaintiffs submitted Celotex's pleadings from another case. These pleadings included detailed history of the Philip Carey Corporation. Celotex made no attempt to controvert this evidence. We agree with the district court that this evidence is sufficient to impose liability on Celotex for the acts of Philip Carey.

Plaintiffs' evidence allowed the district court to find that the Panacon Corporation succeeded to the interest and liabilities of the original Philip Carey Manufacturing Company in 1970. Briggs changed its name to Panacon Corporation on that same date. Under Texas law, the surviving corporation of a merger assumes the liabilities of each of the merging corporations. Tex.Bus.Corp.Act Ann. art. 5.06(A)(3). After the corporate name change, Panacon was the surviving corporation of the merger between Philip Carey and Briggs, and was responsible for Philip Carey's liabilities.

Celotex purchased all of the stock of Panacon in 1972. Under Texas law, a successor corporation is generally not liable for its predecessor's obligations when it acquires the corporation's assets. Tex.Bus.Corp.Act Ann. art 5.10(B)(2). In this case, however, Celotex expressly assumed:

> All debts, liabilities and duties of Panacon to such an extent that they may be enforced against it to the same extent as if such debts, liabilities, and duties had been incurred or contracted by Celotex.

Panacon's liabilities included the liabilities of Philip Carey it inherited from the merger. Celotex in turn expressly assumed responsibility for these liabilities through its purchase of Panacon.

Panacon and later Celotex distributed the asbestos containing products which caused the plaintiffs' injuries. Philip Carey's corporate history, as established by plaintiffs' evidence, together with Celotex's express assumption of liability, support the district court's decision to hold Celotex liable for Philip Carey's acts. The district court properly permitted the jury to assess punitive damages against Celotex for the acts of Philip Carey.

C. Excessiveness

Celotex next argues that the punitive damage awards are excessive and *per se* unreasonable under Texas law. The jury found Celotex liable for approximately $317,625 of the total actual damage awards. The jury then sanctioned Celotex with a total of $6,100,000 in punitive damages. The ratio of punitive damages to actual damages for Celotex is about 20:1.

Texas courts will overturn an award of damages that is so excessive as to be manifestly unjust. To prevent an excessive award of punitive damages, Texas courts require punitive damages to be reasonably proportioned to actual damages. *Alamo Nat'l Bank of San Antonio v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981). This proportionality requirement is simply a tool to help Texas courts determine when an exemplary damage award is the product of the jury's passion rather than its reason. *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987).

Contrary to the implication in Celotex's argument, there is no set ratio between actual damages and punitive damages which will make the award reasonable. Appellate courts must conduct a case by case inquiry to decide whether a particular award satisfies the proportionality requirement. *Kraus*, 615 S.W.2d at 910. We must, therefore, immediately reject Celotex's claim that the punitive damage awards in this case are *per se* unreasonable. The Texas Supreme Court instructs us to consider the following factors to determine whether an award of exemplary damages is reasonable: "(1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer,

(3) [sic] the situation and sensibilities of the parties concerned, and (5) the extent to which the defendant's conduct offends the public sense of justice and propriety." *Id.*

We consider the awards of punitive damages in this case in light of these five factors. The Texas Court of Appeals' recent decision in *State Farm Mut. Auto. Ins. Co. v. Zubiate*, 808 S.W.2d 590 (Tex. Civ. App. 1991) demonstrates the difficulty in applying this test. In *Zubiate*, a jury awarded the plaintiff $165,000 in compensatory damages and $15,000,000 in punitive damages. The defendant challenged the award of punitive damages as excessive. The appeals court agreed, and ordered a remittitur of $14,340,000 of the punitive damages. The court explained its decision as follows:

> State Farm would have this Court apply a reasonable proportion rule at this state of the proceedings. The Courts today are faced with a real dilemma: Is the evidence factually sufficient to support the trial court's judgment upholding the jury award of $15 million in punitive damages against Appellant? Our answer is no, but why? *Because it just is.*

Id. at 605 (emphasis in original). A concurrence in that same opinion is even more direct. The concurring judge argues that "[u]ntil we are able to devise an objective standard by which the jury is to award exemplary damages, we must recognize that the jury's answer will always be arbitrary. If the original award is arbitrary, is it really bad to have an arbitrary review." *Id.* at 607 (Osborn, Chief Judge, concurring).

Recognizing the inherent problems with the purely subjective Texas rule, we must still review the award of punitive damages in this case by subjecting it to the five *Kraus* factors.[4] We hold that the punitive damages award to the plaintiffs is not excessive,

4 The jury awarded ten of the plaintiffs $600,000 each in punitive damages, and $100,000 in punitive damages to another plaintiff. The amount of actual damages Celotex had to pay each of these plaintiffs varied from $3,000 to $84,000.

and is reasonably proportioned to the actual damages. The evidence in the case amply demonstrated that plaintiffs' injuries resulted from exposure to Celotex's asbestos products. A rational jury could have found that the nature of the wrong, Celotex's culpability, and the public's sense of justice require Celotex to pay substantial punitive damages.

Although the size of the punitive damage awards makes us pause, we cannot say that the punitive damage awards in this case violated the Texas rule of proportionality. Celotex has not shown us that the total of the punitive damage awards was the result of passion rather than reason. Recognizing the subjective nature of this determination, we affirm the jury's verdict.

D. Repeated Punitive Damages Awards

Celotex provides us with several policy reasons for not permitting exemplary damages in this case. Celotex also challenges the punitive damage awards under the United States and Texas Constitutions. We have heard Celotex's arguments before, and can dispose of them on the basis of Circuit precedent.

Celotex asks us to focus not only on the punitive damage awards in this case, but also on the punitive damage awards levied against it in previous asbestos cases, and on its exposure in future cases. Celotex argues that repeated punitive damage awards in asbestos litigation defeat the purpose of punitive damages and threaten the ability of future claimants to receive damages for their actual injuries. Celotex reminds us of the number of companies already forced into bankruptcy by asbestos litigation. It claims that the twin goals of punitive damages, punishment and deterrence, are not furthered by repeated punitive damage awards. Repeated punitive damage awards allegedly threaten rather than engender the public good.

Expanding on this public policy theme, Celotex develops the first of three due process arguments. Celotex contends that the

asbestos suits against it all rely on the same culpable conduct. Each time a jury assesses punitive damages against it in these suits, Celotex claims that it is being punished for this same wrongdoing. Celotex concludes that fundamental fairness limits the number of times a corporation must pay punitive damages for a single culpable act. For this reason, multiple punitive damage awards allegedly violate the substantive due process guarantee of the Fourteenth Amendment to the United States Constitution[5], and the corresponding provision of the Texas Constitution.[6]

Celotex's arguments state a proper cause for concern, but they are not new. A panel of this court has recently rejected these same claims. *King*, 906 F.2d at 1031-33; *see also McCleary v. Armstrong World Industries, Inc.*, 913 F.2d 257, 260-61 (5th Cir. 1990); *Edwards*, 911 F.2d at 1154-55. We again reject these claims. In doing so, we point out that each plaintiff injured by Celotex's asbestos-containing products has a cause of action against the company. Each of these plaintiffs also has a right to seek punitive damages for Celotex's willful and intentional failure to warn about the dangers of asbestos. There is not principle in law limiting recovery of punitive damages to the first claimant.

The same fate befalls Celotex's argument that repeated punitive damage awards violate the excessive fines provision of the Texas Constitution.[7] Recent panel decisions found no violation of the excessive fines clause resulting from multiple punitive damage awards in asbestos cases. *See McCleary*, 913 F.2d at 260; *Edwards*, 911 F.2d at 1154; *King*, 906 F.2d at 1029-31. Celotex has not convinced us that the facts of this case allow us to

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5 The Fourteenth Amendment provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of the law."

6 Tex. Const. art. 1, § 19 provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of law."

7 Tex. Const. art. 1, § 13 provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. The Texas Supreme Court has interpreted "fines" as used in this provision to include civil penalties. *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980).

conclude otherwise. If there is to be further control of repeated punitive damage awards, the solution must be found through legislation.

E. Procedural Due Process

During the pendency of this appeal, the Supreme Court decided *Pacific Mutual Life Ins. Co. v. Haslip*, U.S. , 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). In *Haslip*, the Supreme Court rejected a due process challenge to a punitive damage award of $840,000 in an Alabama insurance fraud case. This award was more than four times the $200,000 in compensatory damages awarded to the plaintiff, but over 200 times the plaintiff's out-of-pocket expenses. The Supreme Court did, however, indicate that punitive damage awards were not immune from due process constraints.

We requested supplemental briefing from both parties on the constitutionality of Texas procedures after *Haslip*. We conclude that Texas procedures for assessing and reviewing punitive damage awards satisfy the requirements of due process.

The *Haslip* Court declined to draw a bright line between impermissible and permissible procedures for assessing exemplary damages. *Id.* at _____, 111 S.Ct. at 1043. Instead, the Court reviewed the specific procedures employed in Alabama to determine their constitutionality as satisfying due process requirements. The Court focused on two features of the Alabama system: the discretion accorded the jury in assessing punitive damages and the review conducted by the trial and appellate courts of punitive damage awards. We evaluate Celotex's due process challenge by comparing Texas procedures with the Alabama procedures sanctioned by the Supreme Court.

The Court intimated that unlimited jury discretion in fixing the amount of punitive damages would violate due process. *Id.* To avoid due process problems, the state must place some limitations on the jury's discretion. Review of the jury instructions in the *Haslip* case indicated that the Alabama court had satisfied this

requirement. The court instructed the jury that the purpose of punitive damages was to punish the defendant and to deter future similar conduct, rather than to compensate the plaintiff. The court also told the jury that the amount of punitive damages depended upon the character and degree of the wrong and the necessity of preventing similar conduct. Finally, the court emphasized that the jury did not have to award punitive damages.

In this case, the court instructed the jury that if Celotex had acted willfully, maliciously, intentionally or with heedless and reckless disregard for the plaintiffs' rights, "the law would allow you in your discretion to assess punitive damages against the Defendant as punishment and as deterrent to others." The court further instructed the jury that "[i]n making your determination as to punitive damages you will consider the totality of the circumstances, and you may consider the financial resources of the Defendant in fixing the amount of damages."

Contrary to Celotex's argument, we are unable to detect any significant difference between the instruction given here and the one approved of by the Supreme Court in *Haslip*. As in *Haslip*, the district court imposed limitations on the exercise of the jury's discretion to award punitive damages. The court instructed the jury that the purpose of punitive damages was to punish the defendant and to deter others from similar conduct. The court also said that the jury "may" impose punitive damages. The word "may" cannot be taken as "has to." It was clear from this instruction that the jury could refuse to award punitive damages. If the jury decided to award punitive damages, the court told them to consider the totality of the circumstances in determining the amount of the award.

The *Haslip* Court next considered the post-trial procedures for review of punitive damage awards in Alabama. The Alabama Supreme Court requires trial courts to reflect in the record their reasons for either interfering with an award of punitive damages or for refusing to do so. *Hammond v. City of Gadsden*, 493 So.2d

1374, 1379 (Ala. 1986). Factors for the trial court to consider include the culpability of the defendant's conduct, the need to discourage similar conduct, the impact upon the parties, and the impact on innocent third persons.

The Alabama Supreme Court then conducts an additional review of the punitive damages award. The court first undertakes a comparative analysis of the award. After the comparative analysis, the court evaluates the award to determine whether it is excessive or inadequate. The court's review relies on the following substantive standards: (1) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct, (2) the degree of reprehensibility of the defendant's conduct, (3) the profitability to the defendant of the wrongful conduct, (4) the financial position of the defendant, (5) the costs of the litigation, (6) the imposition of criminal sanctions on the defendant for the conduct, and (7) the existence of other similar awards against the defendant of the same conduct. *See Central Alabama Elec. Co-op v. Tapley*, 546 So.2d 371, 377 (Ala. 1989); *Green Oil Co. v. Hornsby*, 539 So.2d 218, 223-24 (Ala. 1989).

The review of punitive damages awards conducted by Texas courts contains several of the same features as the Alabama system. In Texas, both the trial and appellate courts review punitive damage awards to determine if they are reasonably proportioned to actual damages. *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910. As in Alabama, the Texas Supreme Court has provided factors for the courts to use when conducting this evaluation. These factors include the nature of the wrong, the character of the conduct involved, the degree of culpability, and the extent to which the conduct offends the public's sense of propriety and justice. *Id.*

The Texas scheme differs in at least two respects from the Alabama procedure. Texas trial courts are not required to justify their review of punitive damage awards in the record. The comparative analysis conducted in Alabama also has no place in

Texas courts. The amount of punitive damages awarded in similar cases against the defendant is not an appropriate factor for a Texas court to consider in its review process. Although Texas requires punitive damages to be reasonably proportioned to compensatory damages, no particular ratio between punitive and actual damages is mandated. *Id.*

Celotex directs our attention to footnote 10 in the *Haslip* opinion. In that footnote, the Court apparently disapproves of states that review punitive damage awards only to determine whether they resulted from passion rather than reason. *Haslip*, 111 S.Ct. at 1045 n.10. Celotex claims that since the standards enunciated by the Texas Supreme Court are meant to help lower courts determine whether a punitive damage award is the result of "passion, prejudice, or corruption," *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714, the Texas review procedures do not satisfy due process. We first reject Celotex's implication that a "passion and prejudice" standard of review can never withstand constitutional scrutiny after *Haslip*. *See Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991). We also note that the factors set out by the Texas Supreme Court for review of punitive damages clearly distinguishes the Texas systems from the simplistic "passion and prejudice" analysis referred to in *Haslip*.

Our inquiry is whether, *under the circumstance of this case*, the procedures for assessing and reviewing punitive damages satisfy due process. We agree with Celotex that review of punitive damages awards in Texas is not as extensive as that required in Alabama. We cannot conclude, however, that the difference results in a due process violation. In this case, the court's instructions placed meaningful limitations on the jury's discretion to award punitive damages. Review of the jury's decision by the trial court and appellate court using the *Kraus* standards assures that the award is reasonable and not the result of impermissible factors. We get no indication from *Haslip* that the Court will scrutinize each state's procedure with Alabama as the precise model. The Court laid down the general requirements: limits on jury discretion and adequacy of post-trial review. Texas meets

those requirements. Due process does not require us to upset the jury verdict in this case.[8]

F. Standard of Proof

Celotex argues that the district court employed the wrong standard of proof for exemplary damages. Relying on *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), Celotex claims that federal due process requires a plaintiff to establish a right to punitive damages by clear and convincing evidence. *Addington* involved the standard of proof required for involuntary commitment in a mental institution. That decision has no relevance to the standard of proof for punitive damages.

The Supreme Court addressed the standard of proof issue in a footnote in *Haslip*. Although the Court indicated a preference for a higher standard of proof than preponderance of the evidence, it did not hold that due process requires a clear and convincing standard to sustain an award of punitive damages. *Haslip*, 111 S.Ct. at 1046 n.11. Texas law authorizes recovery of punitive damages upon proof that a preponderance of the evidence justifies the award. *Ford Motor Co. v. Nowak*, 638 S.W.2d at 593. Celotex cannot establish that constitutional due process requires a higher standard of proof based only upon a policy preference expressed by the United States Supreme Court.

Conclusion

There is sufficient evidence in this case to justify all of the compensatory damage awards by the jury. Celotex's attempts to avoid liability for some of the loss of consortium and loss of past earnings capacity claims fail. In addition, the court properly excluded Johns-Manville from the jury interrogatories. This

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8 Three recent Texas Court of Appeals decisions have rejected challenges under *Haslip* to Texas procedures for assessing and reviewing punitive damage awards. *See Fibreboard v. Pool*, 1991 WL 132048 (Tex. Civ. App., July 16, 1991); *K-Mart v. Pearson*, 1991 WL 125337 (Tex. Civ. App., July 3, 1991); *State Farm Mut. Auto. Ins. Co. v. Zubiate*, 808 S.W.2d 590, 603 (Tex. Civ. App. 1991). The *Fibreboard* and *K-Mart* decisions have not yet been released for publication.

decision did not improperly inflate the jury's apportionment of damages to Celotex.

Celotex also failed to show that the jury's award of exemplary damages cannot stand. This Court has considered most of Celotex's arguments before. Although the Supreme Court's decision in *Haslip* indicated that giving the jury unfettered discretion to award punitive damages might violate due process, the established Texas procedures, employed in this case, do not leave the jury without meaningful restraints. The punitive damages awarded here are high, but we cannot say the award violated established law under the finding of the jury as to the willfulness or recklessness of Celotex in this critically serious matter. The recent ruling of the Judicial Panel on Multidistrict Litigation consolidating 26,000 asbestos cases from around the country in one court provides a more reasonable approach for awarding exemplary damages in these cases, but this far-reaching new procedure does not thwart the rights of the seriously injured plaintiffs in this case each to pursue and achieve his or her own personal right to recovery under established principles of law.

AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 90-4095

D.C. Docket No. CA-M-85-158 consl. w/M-85-108, M-85-118, M-85-134, M-85-139, M-85-146, M-85-154, M-85-156, M-85-55 and M-87-173

WILLIAM EARL GLASSCOCK, CHARLES A. REICH, GARY N. STARKEY, LINA R. STARKEY, GUS GEISLER, SR., LENA GEISLER, MALVIN R. LANE, NANCY S. LANE, CARLOS G. GONZALEZ, DELIA S. GONZALEZ, WILLIAM E. SMITH, SANDRA SMITH, JAMES W. PHILLIPS, BARBARA E. PHILLIPS, ROY G. GHENT, LOIS T. GHENT, CHARLES MARSH, and LEETA FAY MARSH,

Plaintiffs-Appellees,

versus

ARMSTRONG CORK CO., ET AL.,

Defendants,

THE CELOTEX CORP.,

Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Texas

Before CLARK, Chief Judge, WILLIAMS and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to Plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: DEC. 12, 1991 October 24, 1991

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 90-4095

WILLIAM EARL GLASSCOCK, CHARLES A. REICH, GARY N. STARKEY, LINA R. STARKEY, GUS GEISLER, SR., LENA GEISLER, MALVIN R. LANE, NANCY S. LANE, CARLOS G. GONZALEZ, DELIA S. GONZALEZ, WILLIAM E. SMITH, SANDRA SMITH, JAMES W. PHILLIPS, BARBARA E. PHILLIPS, ROY G. GHENT, LOIS T. GHENT, CHARLES MARSH, and LEETA FAY MARSH,

Plaintiffs-Appellees,

versus

ARMSTRONG CORK CO., ET AL.,

Defendants,

THE CELOTEX CORP.,

Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 10/24/91, 5 Cir., 198 , F.2d)

(December 2, 1991)

Before CLARK, Chief Judge, WILLIAMS and DAVIS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. S. Williams

United States Circuit Judge

Judge Barksdale did not participate in the consideration of the Suggestion for Rehearing En Banc.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WILLIAM EARL GLASSCOCK, ET AL.	
vs.	No. M-85-0158-CA
ARMSTRONG CORK COMPANY, ET AL.	

JUDGMENT

On motion of the Plaintiffs for Judgment on the Verdict of the Jury, it is ORDERED that Judgment is hereby entered in behalf of the Plaintiffs. It is ORDERED that the Plaintiffs receive the following amounts, together with post-judgment interest on said sums from date of entry of judgment until paid at the rate of 7.66% per annum, compounded annually, from The Celotex Corporation (successor to Philip Carey Manufacturing Company):

a) WILLIAM EARL GLASSCOCK shall recover $684,000.00;

b) ROY B. GHENT shall recover $612,500.00;

c) LOIS T. GHENT shall recover $109,000.00;

d) CHARLES MARSH shall recover $675,000.00;

e) LETA FAYE MARSH shall recover $3,125.00;

f) CHARLES A. REICH shall recover $640,000.00;

g) GARY N. STARKEY shall recover $609,000.00;

h) LINDA STARKEY shall recover $2,250.00;

i) GUS GEISLER, SR. shall recover $614,000.00;

j) LENA GEISLER shall recover $3,500.00;

k) MALVIN R. LANE shall recover $603,000.00;

l) NANCY LANE shall recover $750.00;

m) CARLOS G. GONZALEZ shall recover $608,000.00;

n) DELIA S. GONZALEZ shall recover $2,000.00;

o) WILLIAM E. SMITH shall recover $610,000.00;

p) SANDRA SMITH shall recover $2,500.00;

q) JAMES W. PHILLIPS shall recover $636,000.00; and

r) BARBARA E. PHILLIPS shall recover $3,000.00.

It is further ORDERED that all taxable costs of court expended or incurred in this cause by Plaintiffs are hereby adjudged against The Celotex Corporation. All writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary. All other relief not expressly granted herein is DENIED.

SIGNED this the 19th day of January, 1990.

/s/ SAM B. HALL, JR.

Sam B. Hall, JR.
United States District Judge

POST-HASLIP CASES AFFIRMING PUNITIVE DAMAGE AWARDS

	Style	Punitive Damage Award	Ratio To Compensatory Award
1.	*Commonwealth Lloyds' Ins. Co. v. Thomas,* S.W.2d , 1992 WL 15671 (Tex. App.—Dallas 1992, no writ).	$ 2,000,001	3:1
2.	*K-Mart Corp.*, 818 S.W. 2d 410 (Tex. App.—Houston [1st Dist.] 1991, no writ).	$ 2,200,000	1:1
3.	*Transportation Ins. Co. v. Moriel,* 814 S.W.2d 144 (Tex. App.—El Paso 1991, writ granted).	$ 1,000,000	10:1
4.	*General Chem. Corp. v. De La Lastra,* 815 S.W.2d 750 (Tex. App.—Corpus Christi 1991, writ requested).	$15,000,000	2.4:1
5.	*Fibreboard Corp. v. Pool,* 813 S.W.2d 658 (Tex. App.—Texarkana 1991, no writ).	$ 5,000,000	1:1
6.	*Braswell v. ConAgra, Inc.*, 936 F.2d 1169 (11th Cir. 1991).	$ 9,100,000	2:1
7.	*Smith v. States Gen. Life Ins. Co.,* So.2d , 1992 WL 5274 (Ala. 1992).	$ 250,000	416:1
8.	*Fraser v. Reynolds,* 588 So.2d 448 (Ala. 1991).	$ 375,000	23:1
9.	*Standard Plan, Inc. v. Tucker,* 582 So.2d 1024 (Ala. 1991).	$ 500,000	462:1
10.	*Principal Fin. Group v. Thomas,* 585 So.2d 816 (Ala. 1991), *cert. denied,* 112 S.Ct. 649 (1991).	$ 750,000	750:1

	Style	Punitive Damage Award	Ratio To Compensatory Award
11.	*Southern Life and Health Ins. Co. v. Turner*, 586 So.2d 854 (Ala. 1991).	$ 499,000	499:1
12.	*Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991).	$ 500,000	500:1
13.	*Defender Indus. Inc. v. Northwestern Mut. Life Ins.*, 938 F.2d 502 (4th Cir. 1991).	$ 5,000,000	47:1
14.	*Gordon v. State*, 585 So.2d 1033 (Fla. 3d DCA 1991).	$ 204,800	3:1
15.	*In re Salmon*, 128 B.R. 313 (Bankr. M.D. Fla. 1991).	$ 250,000	1:1
16.	*Heideman v. American Family Ins. Group*, 473 N.W. 2d 14 (Wis. App. 1991), review denied (1991).	$ 500,000	3:1
17.	*Las Palmas Assoc. v. Las Palmas Center*, 1 Cal. Rptr. 2d 301 (Cal. App. 2 Dist. 1991).	$ 2,000,000	9:1
18.	*United Farm Bureau Mut. Ins. Co. v. Ira*, 577 N.E.2d 588 (Ind. App. 4 Dist. 1991).	$ 105,000	2:1
19.	*GN Danavox, Inc. v. Starkey Laboratories, Inc.*, 476 N.W.2d 172 (Minn. App. 1991), review denied (1991).	$ 1,500,000	3:1
20.	*Baxter v. Grange Mutual Casualty Co.*, N.E.2d , 1992 WL 12799 (Ohio App. 5 Dist. 1992).	$ 250,000	17:1
21.	*Hospital Auth. v. Jones*, 409 S.E.2d 501 (Ga. 1991), *petition for cert. filed*, Nov. 27, 1991.	$ 1,300,000	260:1

POST-HASLIP CASES REMANDED

	Style	Punitive Damage Award	Ratio To Compensatory Award
1.	*Cole v. Control Data Corp.*, 947 F.2d 313 (8th Cir. 1991).	$ 500,000	1:4
2.	*Union Nat. Bank v. Mosbacher*, 933 F.2d 1440 (8th Cir. 1991) *cert. denied*, 112 S.Ct. 870 (1992).	$3,000,000 $1,500,000	3:1 9:1
3.	*Teitel v. First Los Angeles Bank*, 282 Cal. Rptr. 916 (Cal. App. 2 Dist. 1991), review denied (1991).	$ 500,000	54:1
4.	*Crookston v. Fire Ins. Exchange*, 817 P.2d 789 (Utah 1991).	$ 4,000,000	5:1

POST-HASLIP CASES REMITTED

	Style	Punitive Damage Award	Ratio To Compensatory Award
1.	*Dunn v. Owens-Corning Fiberglass*, 774 F. Supp. 929 (D.V.I. 1991).	$25,000,000	19:1
2.	*Bradley v. Hubbard Broadcasting, Inc.*, 471 N.W.2d 670 (Minn. App. 1991), review denied (1991).	$ 500,000	42:1
3.	*Muehlstedt v. City of Lino Lakes*, 473 N.W.2d 892 (Minn. App. 1991), review denied (1991).	$ 170,000	11:1
4.	*State Farm Mut. Auto Ins. Co. v. Zubiate*, 808 S.W.2d 590 (Tex. App.—El Paso 1991, writ denied).	$15,000,000	91:1

EXCERPTS FROM JURY INSTRUCTIONS

The Plaintiffs also claim that the acts of Defendant was [sic] done willfully, intentionally, or with a callous or reckless and heedless disregard and indifference to the rights and welfare of the Plaintiffs, and that such conduct entitles them to an award of punitive damages in addition to compensatory damages.

I instruct you that under the law of Texas a heedless and reckless disregard means more than momentarily thoughtlessness, inadvertence, or error of judgement [sic]. It means such an entire wont of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare or safety of the persons affected by it.

In their claim for punitive damages the Plaintiffs claim generally that the Defendant acted willfully, intentionally or with reckless indifference in withholding from the Plaintiffs as well as from the public in general information as to the potential dangers of asbestos products and failed to test its products and to warn Plaintiffs long after the Defendant had actual knowledge of the dangers connected with the use of its products.

The Plaintiffs also contend that this action on the part of the Defendant continued for many years and was knowingly designed by the Defendant to cause the Plaintiffs and their household members and other similarly situated workers to remain ignorant of the nature of their asbestos products. If you find for the Plaintiffs and if you further find that the Defendant did act with malice, willfulness, intentionally or with the heedless and reckless disregard or indifference to the rights of others, the law would allow you in your discretion to assess punitive damages against the Defendant as punishment and as deterrent to others.

In making your determination as to punitive damages you will consider the totality of the circumstances, and you may consider the financial resources of the Defendant in fixing the amount of such damages.

* * *

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 90-4095

THE CELOTEX CORPORATION,

Appellant,

VS.

WILLIAM EARL GLASSCOCK, ET AL.,

Appellees.

MOTION TO MODIFY THE RECORD

TO THE HONORABLE JUDGE OF SAID COURT AND ALL PARTIES:

Appellant The Celotex Corporation ("Celotex") requests that the affidavit of Dennis F. Conway attached as Exhibit A to this motion be added to the record on appeal in this matter pursuant to Fed. R. App. P. 10(e). In support of this motion, Celotex shows as follows:

1. Oral argument in this case was held on April 1, 1991. One of the major issues in this appeal, which was discussed extensively at the oral argument, was the limitations imposed by due process on multiple awards of punitive damages against the defendant for a single course of conduct.
2. The record in this case contains affidavits submitted to the trial court on April 14, 1989, as exhibits to Celotex's Motion and Brief to Preclude Submission or Consideration of Punitive Damages which showed that, as of April 14, 1989, punitive damages had been awarded against Celotex in over twenty-five cases and totalling over $9 million. Rec. Ex. 2 at 20.

3. Since the time the original Celotex affidavits were submitted to the trial court on April 14, 1989, a substantial amount of additional punitive damage awards have been entered against Celotex in a large number of additional asbestos-related personal injury cases. As shown by the affidavit of Dennis F. Conway, attached hereto as Exhibit A, punitive damages totalling more than $35 million have been awarded against Celotex in favor of ninety-six separate plaintiffs as of October 12, 1990. October 12, 1990, was the date on which Celotex sought protection under Chapter 11 of the United States Bankruptcy Code.

4. Celotex asks that the record in this case be modified to include the Dennis F. Conway affidavit attached hereto as Exhibit A so that the record will accurately and fairly reflect all punitive damages awarded against Celotex to the present time. Without the inclusion of the Conway affidavit, this Court will not have a full record of all punitive damage awards against Celotex. The due process arguments of Celotex must be examined in light of all relevant facts, including the facts contained in the Conway affidavit.

5. This Court has the discretionary authority under both Fed. R. App. P. 10(e) and the Court's inherent equitable powers to supplement the record on appeal to include matters not in the trial court record when supplementation would serve the interests of justice and the efficient use of judicial resources. *Waguespack v. Aetna Life & Casualty Co.*, 795 F.2d 523, 525 (5th Cir. 1986; *In re GHR Energy Corp.*, 791 F.2d 1200, 1201-02 (5th Cir. 1986); *Gibson v. Blackburn*, 744 F.2d 403, 405 n. 3 (5th Circ. 1984); *Dickerson v. State of Alabama*, 667 F.2d 1364, 1367 (11th Cir.), *cert. denied*, 459 U.S. 878 (1982). Supplementing the record with the Conway affidavit would provide for a fairer resolution of the case without forcing the delay or inconvenience of remand.

WHEREFORE, Appellant The Celotex Corporation requests that the record in this case be modified to include the attached affidavit of Dennis F. Conway, and that Celotex provide such other and further relief to which it is justly entitled.

BUTLER & BINION

By: /s/ KEVIN F. RISLEY

Kevin F. Risley
State Bar No. 16941200
1600 First Interstate
Bank Plaza
Houston, Texas 77002-5008
(713) 237-3293
FAX (713) 237-3201

ATTORNEYS FOR APPELLANT
THE CELOTEX CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been forwarded to counsel for Appellees, Mr. Paul Sadler, Wellborn, Houston, Adkison, Mann & Sadler, P. O. Box 1109, Henderson, Texas 75653-1109, by certified mail, return receipt requested, on this 25th day of April, 1991.

/s/ KEVIN F. RISLEY

Kevin F. Risley

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Before me, the undersigned authority, on this day personally appeared Dennis F. Conaway, who being by me first duly sworn, deposed upon oath and said:

My name is Dennis F. Conaway. I am Manager of Accounting Services of The Celotex Corporation.

As of August 31, 1989, The Celotex Corporation was a Defendant in approximately 85,000 lawsuits in which plaintiffs claim personal injury or wrongful death damages from exposure to asbestos products manufactured and sold by Celotex or its predecessor for ordinary liability, The Philip Carey Manufacturing Company. These asbestos lawsuits have been filed against Celotex in virtually every state of the United States, the Commonwealth of Puerto Rico, and the Territory of Guam. As of August 31, 1989, Celotex had disposed of approximately 31,000 asbestos-related bodily injury lawsuits by settlement, dismissal or judgment.

Punitive or exemplary damages are sought against Celotex in the majority of the asbestos lawsuits that have been filed against Celotex.

Cases in which punitive damages were sought by the plaintiffs, awarded by the jury, affirmed on appeal and paid by Celotex are:

Leonard Pickett vs. JMSC, et al	Cir. Ct., Duval Cnty, FL	#81,92167	$ 100,000
William M. Carper vs. OCFC, et al	Cir. Ct., Kanawha Cnty, WV	#84-C-1117	$ 75,000
Jack P. Racich vs. AC&S, Inc., et al	USDC, SDNY	#87-CIV-0628	$ 100,000
John E. Johnson vs. The Celotex Corp., et al	USDC, SDNY	#87-CIV-0724	$1,000,000
Joseph LaDuca vs. Armstrong World Ind., et al	USDC, SDNY	#87-CIV-4292	$ 30,000
Nolberto Aguirre vs. OCFC, et al	USDC, WD TX	#87-CA-274	$ 50,000
Guillermo S. Aguirre vs. OCFC, et al	USDC, WD TX	#87-CA-275	$ 50,000
Antonio T. Galindo vs. OCFC, et al	USDC, WD TX	#87-CA-295	$ 50,000

In addition, since October 1, 1988, the following punitive damage awards have been made against Celotex in asbestos-related personal injury cases.

EXHIBIT A

Plaintiff's Name	Date	Court	Case No.	Amount
Charles E. Marple	12/1/88	USDC SD OH	C-1-86-754	500,000
Robert Cantrel	12/1/88	USDC SD OH	C-1-86-599	500,000
Manuel Lucero	1/20/89	USDC, NM	86-0785-JB	35,000
Robert L. Coker	2/3/89	USDC ND GA	86-1954A	50,000
Warren Coker	2/3/89	USDC ND GA	86-1955A	50,000
Charles R. Moore	2/3/89	USDC ND GA	86-1235A	50,000
Troy H. Manning	2/3/89	USDC ND GA	86-680A	50,000
Jennings F. Davis	2/28/89	Cir. Ct., Monongalia Cty, WV	86-C-763	40,000
Lloyd D. King	3/20/89	USDC ED TX	M-85-44-CA	125,000
Louann M. King	3/20/89	USDC ED TX	M-85-89-CA	125,000
A. B. Wilis, Jr.	3/20/89	USDC ED TX	M-85-64-CA	125,000
Cletus L. Gresham	3/20/89	USDC ED TX	M-85-100-CA	350,000
Larry J. Jones	3/20/89	USDC ED TX	M-85-226-CA	200,000
Johnny E. Fowler	3/20/89	USDC ED TX	M-85-34-CA	125,000
Albert Marble	3/20/89	USDC ED TX	M-85-213-CA	500,000

Plaintiff's Name	Date	Court	Case No.	Amount
Bennie Edwards	4/17/89	USDC ED TX	CA7-87-0050	245,500
Gerald Drago	4/28/89	USDC ED TX	87-CIV-4277	375,000
Billy McCleary	5/4/89	USDC ED TX	85-CA-0914	200,000
Shirley Tate	6/9/89	94th Jud. Dist., Nueces Cty, TX	85-15599-C	1,000,000
Clifford Chamlee	9/8/89	USDC WD TX	MO-89-CA-005	50,000
Ronnie Trent	10/5/89	160th Jud. Dist. Dallas Cty, TX	88-04617-1	25,000
Lessie Williams	10/19/89	4th Jud. Dist., Rusk Cty., TX	88-08-293	200,000
Reuben S. Pool	10/19/89	4th Jud. Dist., Rusk Cty., TX	86-363	250,000
Thomas Sledge	10/19/89	4th Jud. Dist., Rusk Cty., TX	86-363	250,000
Charles W. Strong	10/19/89	4th Jud. Dist., Rusk Cty., TX	86-363	250,000
Donald Freeman	10/19/89	4th Jud. Dist., Rusk Cty., TX	86-363	250,000
Darrell Fitzpatrick	11/10/89	Cir. Ct. Pleasants Cty., WV	88-C-34	7,500
William R. Owen	11/10/89	Cir. Ct. Pleasants Cty., WV	88-C-34	7,500
Hersel Kemp	11/10/89	Cir. Ct. Pleasants Cty., WV	88-C-39	7,500
Donald Hogan	11/17/89	Circ. Ct. Jackson Cty., MO	CV87-026953	198,333
Roy B. Ghent	12/1/89	USDC, E. Dist. Marshall, TX	M87-55	600,000
Lois K. Ghent	12/1/89	USDC, E. Dist. Marshall, TX	M87-55	100,000
Charles Marsh	12/1/89	USDC, E. Dist. Marshall, TX	M87-173	600,000
William E. Glasscock	12/1/89	USDC, E. Dist. Marshall, TX	M85-158	600,000

Plaintiff's Name	Date	Court	Case No.	Amount
Gary N Starkey	12/1/89	USDC, E. Dist. Marshall, TX	M85-118	600,000
Charles A. Reich	12/1/89	USDC, E. Dist. Marshall, TX	M85-108	600,000
James W. Phillips	12/1/89	USDC, E. Dist. Marshall, TX	M85-156	600,000
Gus Geisler, Sr.	12/1/89	USDC, E. Dist. Marshall, TX	M85-134	600,000
William E. Smith	12/1/89	USDC, E. Dist. Marshall, TX	M85-154	600,000
Carlos G. Gonzalez	12/1/89	USDC, E. Dist. Marshall, TX	M85-146	600,000
Malvin Lane	12/1/89	USDC, E. Dist. Marshall, TX	M85-139	600,000
William A. Angotti	12/12/89	Circ. Ct., KC Jackson Cty, MO	CV86-28352	250,000
Kenneth O. Allen	3/2/90	USDC, S.D., AL		50,000
Claude Cimino	3/29/90	USDC, E.D., TX	B-86-0456-CA	67,500
Norman Atchison	3/29/90	USDC, E.D., TX	B-86-0456-CA	300,000
Sam Brocato, Jr.	3/29/90	USDC, E.D., TX	B-86-0456-CA	48,750
Gussie Daigle	3/29/90	USDC, E.D., TX	B-86-0456-CA	64,500
Robert Dorsey	3/29/90	USDC, E.D., TX	B-86-0456-CA	45,000
Anna Mae Nations (Lowell)	3/29/90	USDC, E.D., TX	B-86-0456-CA	120,000
Thad Pamplin	3/29/90	USDC, E.D., TX	B-86-0456-CA	240,000
LaSalle Rhymes	3/29/90	USDC, E.D., TX	B-86-0456-CA	52,500
Lee Roy Myers	3/29/90	USDC, E.D., TX	B-86-0456-CA	320,000

Plaintiff's Name	Date	Court	Case No.	Amount
Gordon L. House	5/4/90	Circ. Ct. Escambia Cty, FL	87-1427	400,000
Harry Wingate	5/24/90	Circ. Ct. Duval Cty, FL	89-2159	189,000
Shirley Peters	5/25/90	Circ. Ct. Kanawha Cty, WV	85-C-4	207,909
Freda Jones	5/25/90	Circ. Ct. Kanawha Cty, WV	85-C-2137	231,673
William Winter	5/25/90	Circ. Ct. Kanawha Cty, WV	84-C-3868	61,400
Lora Older	5/25/90	Circ. Ct. Kanawha Cty, WV	85-C-4288	26,499
John Thomann	6/11/90	St. Supreme NY		50,000
Henry Powell (Emma for)	6/12/90	St. Superior NJ	#L-077770-84	856,000
Bernard Brames	6/15/90	Circ. Ct. Palm Beach Co.	#225304	100,000
Daniel Rawski	7/19/90	St. Supreme Ct. Niagara Cty, NY		50,000
James Fauver	7/25/90	193rd Jud. Dist. Dallas Cty., TX	88-5254-L	750,000
Bobby F. Leach	7/25/90	193rd Jud. Dist. Dallas Cty., TX	88-5254-L	750,000
George W. Newbill	7/25/90	193rd Jud. Dist. Dallas Cty., TX	88-5254-L	750,000
Vernon V. Moore	7/25/90	193rd Jud. Dist. Dallas Cty., TX	88-5254-L	750,000
James W. Campbell	7/25/90	193rd Jud. Dist. Dallas Cty., TX	88-5254-L	750,000
Robert C. Hill	7/25/90	193rd Jud. Dist. Dallas Cty., TX	88-5254-L	750,000
Leroy Lewis	7/25/90	193rd Jud. Dist. Dallas Cty., TX	88-5254-L	750,000
Cleveland Moorer	7/25/90	193rd Jud. Dist. Dallas Cty., TX	88-5254-L	750,000

Plaintiff's Name	Date	Court	Case No.	Amount
Andrew Johnston	7/25/90	193rd Jud. Dist. Dallas Cty., TX	88-5279-L	750,000
Melvin L. Silvers	7/25/90	193rd Jud. Dist. Dallas Cty., TX	88-5279-L	750,000
William W. Loper	7/25/90	193rd Jud. Dist. Dallas Cty., TX	88-5279-L	750,000
John McIntyre	7/25/90	193rd Jud. Dist. Dallas Cty., TX	88-5279-L	750,000
Richard Peoples	7/25/90	193rd Jud. Dist. Dallas Cty., TX	88-5279-L	750,000
Johnson Littles	7/25/90	193rd Jud. Dist. Dallas Cty., TX	88-5279-L	750,000
James Cowart	7/27/90	4th Jud. Cir. Duval Cty. FL	89-1824-CA	35,000
Arthur Daniel Kilbane	8/3/90	Superior Ct. Alameda Cty, CA	6615402	1,000,000
Eva Mae Gregory	9/19/90	USDC, E. Dist. Marshall, TX	M-84-196-CA	100,000
Hannah Weaver	9/19/90	USDC, E. Dist. Marshall, TX	M-86-112-CA	300,000
Bernard Fisher	10/10/90	Cir. Ct., Putnam Cty, WV	89-C-53	366,900
Lema G. Oxley	10/10/90	Cir. Ct., Putnam Cty, WV	89-C-215	380,400
James C. Markham	10/10/90	Cir. Ct., Putnam Cty, WV	89-C-55	1,236,000
Charles Spaniol	10/10/90	Cir. Ct., Putnam Cty, WV	89-C-56	813,000
Marian V. Frazier	10/10/90	Cir. Ct., Putnam Cty, WV	89-C-217	399,900

Plaintiff's Name	Date	Court	Case No.	Amount
Delmar Blankenship	10/10/90	Cir. Ct., Putnam Cty, WV	89-C-111	1,086,600
Lewis A. Willard, Jr.	10/10/90	Cir. Ct., Putnam Cty, WV	89-C-352	813,000
Rex R. Hill	10/10/90	Cir. Ct., Putnam Cty, WV	89-C-83	1,086,600

SUBSCRIBED AND SWORN To before me this 12th day of April, 1991, to certify which witness my hand and seal of office.

/s/ BARBARA L. HARRIS

Notary Public

My Commission Expires: 8/20/93

/s/ DENNIS F. CONAWAY

Dennis F. Conaway
Manager of Accounting Services

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 90-4095

WILLIAM EARL GLASSCOCK, CHARLES A. REICH, GARY N. STARKEY, LINA R. STARKEY, GUS GEISLER, SR., LENA GEISLER, MALVIN R. LANE, NANCY S. LANE, CARLOS G. GONZALEZ, DELIA S. GONZALEZ, WILLIAM E. SMITH, SANDRA SMITH, JAMES W. PHILLIPS, BARBARA E. PHILLIPS, ROY G. GHENT, LOIS T. GHENT, CHARLES MARSH, and LEETA FAY MARSH,

Plaintiffs-Appellees,

versus

ARMSTRONG CORK CO., ET AL.,

Defendants,

THE CELOTEX CORP.,

Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Texas

ORDER:

IT IS ORDERED that appellant's motion to modify the record is DENIED. The existing record accurately reflects the evidence established at the time of trial. The proposed modification would introduce new evidence which has arisen since trial.

/s/ JERRE S. WILLIAMS

UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
APR 1 1992
OFFICE OF THE CLERK

(2)

No. 91-1395

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE CELOTEX CORPORATION
Petitioner,
v.
WILLAM EARL GLASSCOCK, et al.,
Respondents.

On Petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

PAUL L. SADLER
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Alpha Law Brief Co * 6113 Aletha Lane* Houston, Texas 77081 (713)981-9000

QUESTIONS PRESENTED

1. Did the Supreme Court, in *Pacific Mutual Insurance Co. v. Haslip*, provide appropriate and meaningful guidelines to state and lower federal courts in reviewing due process challenges to punitive damage awards?

2. Whether the Texas common law system, as defined by the Texas Supreme Court, provides sufficient due process safeguards for the imposition of punitive damages?

3. Whether a ratio of punitive damages awarded compared to actual damages ranging from 1:1 to 6:1 in eleven consolidated cases violates due process after sufficient jury instructions and complete appellate review?

4. Whether the assessment of punitive damages in the asbestos litigation involving individual lawsuits relating to specific individual harm violates due process.

LIST OF PARTIES

Petitioner, The Celotex Corporation, was the Defendant/Appellant below.

Respondents are:

William Earl Glasscock
Roy B. Ghent
Lois T. Ghent
Charles Marsh
Leta Faye Marsh
Charles A. Reich
Gary N. Starkey
Linda Starkey
Gus Geisler, Sr.
Lena Geisler
Malvin R. Lane
Nancy Lane
Carlos Gonzalez
Delia Gonzalez
William E. Smith
Sandra Smith
James W. Phillips
Barbara E. Phillips

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 4

I. THIS COURT SHOULD DENY THE WRIT BECAUSE *HASLIP* PROVIDED SUFFICIENT GUIDANCE FOR DETERMINING A DUE PROCESS CHALLENGE TO AN AWARD OF PUNITIVE DAMAGES AND TEXAS LAW HAS ESTABLISHED AND PROVIDES SUFFICIENT DUE PROCESS SAFEGUARDS FOR THE IMPOSITION OF A PUNITIVE AWARD IN THIS CASE. 4

A. THE LOWER COURTS ARE PROPERLY APPLYING *HASLIP*. MORE IMPOR-

TANTLY, IN THIS CASE, THE FIFTH CIRCUIT PROPERLY APPLIED *HASLIP*. 4

B. THE TEXAS COMMON LAW SYSTEM OF ASSESSING AND REVIEWING PUNITIVE DAMAGES DOES PROVIDE SUFFICIENT DUE PROCESS SAFEGUARDS. . . 5

C. TEXAS LAW SPECIFICALLY PROVIDES FOR APPELLATE REVIEW OF PUNITIVE DAMAGES AND REQUIRES THAT THE PUNITIVE DAMAGE AWARD BEAR A REASONABLE RELATIONSHIP TO COMPENSATORY DAMAGES 10

II. THE ASSESSMENT OF PUNITIVE DAMAGES IN ASBESTOS LITIGATION RELATES TO SPECIFIC INDIVIDUAL HARM AND DOES NOT VIOLATE DUE PROCESS. 11

CONCLUSION 15

APPENDIX A 1a

TABLE OF AUTHORITIES

CASES	PAGE
Alamo National Bank v. Kraus, 616 S.W.2d 908 (Tex. 1981)	7, 9, 10
Borel v. Fibreboard Paper Products Corp., 493 F.2d. 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869	11
Glasscock v. Armstrong Cork Co., 946 F.2d 1085 (5th Cir. 1991)	9
Hansen v. Johns-Manville Products Corp., 734 F.2d 1036 (5th Cir. 1984) *cert. denied*, 105 S.Ct. 1749, 84 L.Ed.2d 814 (1985)	14
Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 524-525 (5th Cir. 1984) *reversed*, 750 F.2d 1314 (5th Cir. 1985) (en banc), *modified* 781 F.2d 394 (5th Cir. 1986) (en banc)	14
King v. Armstrong World Industries, Inc., 906 F.2d 1022 (5th Cir. 1990), *reh'g denied*, 914 F.2d 251, *cert. denied*, 111 S.Ct. 2236	3, 14
Nabours v. Longview Savings & Loan Association, 700 S.W.2d 901 (Tex. 1985)	7, 10
Pacific Mutual Life Insurance Co. v. Haslip, 111 S.Ct. 1032 (1991)	3, 5, 7, 9

CONSTITUTIONS AND STATUTES

28 U.S.C. §1254(i) 1

28 U.S.C. §1332(a) 1

U.S. Const. amend. V 2

U.S. Const. amend. XIV 2

NO. 91-1395

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

THE CELOTEX CORPORATION
Petitioner,

v.

WILLIAM EARL GLASSCOCK, et al,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GROUNDS FOR JURISDICTION

The United States Court of Appeals entered an Order on October 24, 1991, affirming the decision of the District Court. The United States Court of Appeals denied Petition for Rehearing and Suggestion for Rehearing En Banc on December 2, 1991. This Court has jurisdiction to review the Judgment in this case by Writ of Certiorari pursuant to 28 U.S.C. §1254(i).

Jurisdiction in the District Court was based on 28 U.S.C. §1332(a).

STATUTES INVOLVED

This Petition involves the Due Process clause of the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

This lawsuit involves eleven consolidated actions alleging personal injury resulting from exposure to asbestos contained in products manufactured and sold by the Petitioner. The basis of the underlying claims are strict liability/failure to warn and gross negligence. All of the other defendants except the Petitioner settled prior to the verdict. After a lengthy trial the jury rendered a verdict in favor of the Respondents awarding compensatory and punitive damages. After extensive post-verdict motions and careful review, the District Court entered Judgment based upon the jury verdict.

This appeal involves specific allegations of misconduct by this defendant and individualized harm to specific individuals. The jury properly awarded damages based solely upon the conduct of this defendant as it related to each individual. Celotex was not and has never been punished for the "same course of conduct" for "all injured individuals exposed to its products."

In an attempt to impugn the jury verdict Celotex compares actual damages to exemplary damages, *after credit for contribution* by other defendants and presents a distorted view of the jury verdict. If traditional analysis is applied to the findings of the jury, the comparison of actual damages awarded to punitive damages awarded demonstrates a ratio range of 1:1 to 6:1, as follows:

PLAINTIFF	ACTUAL DAMAGES	PUNITIVE DAMAGES	RATIO
Glasscock	400,000	600,000	1.5
Ghent (Roy)	100,000	600,000	6
Ghent (Lois)	65,000	100,000	1.54
Marsh	600,000	600,000	1

Reich	400,000	600,000	1.5
Starkey	100,000	600,000	6
Geisler	100,000	600,000	6
Lane	100,000	600,000	6
Gonzales	100,000	600,000	6
Smith	100,000	600,000	6
Phillips	300,000	600,000	2

This jury verdict was reviewed according to Texas law by an experienced trial judge prior to entering the Judgment. The Judgment was subsequently reviewed by the Fifth Circuit pursuant to Texas law and this Court's recent decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). The Fifth Circuit affirmed the Judgment of the District Court and denied Celotex's Petition for Rehearing and Suggestion for Rehearing En Banc on December 2, 1991.

During the pendency of this appeal this same Petitioner filed a Petition for Writ of Certiorari in *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *reh'g denied*, 914 F.2d 251, *cert. denied*, 111 S.Ct. 2236 (1991), No. 90-1490, presenting these same challenges. See Appendix A. This Court denied that Petition.

Contrary to Celotex's argument, the Fifth Circuit reviewed the jury instructions and award in light of the *Haslip* opinion and specifically found that the District Court imposed limitations on the exercise of the jury's discretion to award punitive damages, emphasized that any award of punitive damages was discretionary with the jury, outlined the specific conduct that would warrant an award of punitive damages, and emphasized that the purpose of punitive damages was deterrence and punishment. Additionally, the Fifth Circuit carefully analyzed the post-trial procedures for review of punitive damage awards by Texas law and found that Texas had many of the same features as that found in *Haslip*. Finally, with respect to Petitioner's unwarranted claim that the Texas System of review is merely a "passion

and prejudice review" the Fifth Circuit stated "that the factors set out by the Texas Supreme Court for review of punitive damages clearly distinguishes the Texas systems from the simplistic 'passion and prejudice' analysis referred to in *Haslip*." Obviously, this Court should deny the Petition for Celotex.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS COURT SHOULD DENY THE WRIT BECAUSE *HASLIP* PROVIDED SUFFICIENT GUIDANCE FOR DETERMINING A DUE PROCESS CHALLENGE TO AN AWARD OF PUNITIVE DAMAGES AND TEXAS LAW HAS ESTABLISHED AND PROVIDES SUFFICIENT DUE PROCESS SAFEGUARDS FOR THE IMPOSITION OF A PUNITIVE AWARD IN THIS CASE.

A. THE LOWER COURTS ARE PROPERLY APPLYING *HASLIP*. MORE IMPORTANTLY, IN THIS CASE, THE FIFTH CIRCUIT PROPERLY APPLIED *HASLIP*.

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991), this Court gave guidance to the Courts of this country in determining whether or not a punitive damage award comports with the requirements of the Due Process Clause. Following the *Haslip* Opinion, the Fourth, Eighth and Eleventh Circuits, at least, have struck down punitive damage awards on the grounds that the awards did not meet the Supreme Court's due process requirements. Additionally, numerous State Court opinions have found due process violations under this Court's standard. Although the Petitioner complains that this Court's opinion was insufficient

in addressing the issue, it is clear that the Courts of this country have had little problem understanding the test of *Haslip*.

This Court, in *Haslip*, gave very specific guidance concerning due process with respect to proper jury instructions, adequate appellate review, and general concerns of reasonableness of the amount of the award in light of the conduct involved and the harm sustained. A constitutional test for due process applicable to the law of all fifty states must not be so rigid that the individual facts and circumstances of the case cannot be considered. The Petitioner would have this Court impose a rigid standard with no regard for the atrocity committed, individual suffering, or a community sense of fairness and wrong which is the hallmark of the American jury system. This Court has placed meaningful guidelines in motion for the review of a due process challenge to a punitive damage award and should not alter those guidelines.

Finally, the Fifth Circuit, in reviewing this particular case, specifically considered the due process challenge under the guidance of *Haslip*. The Fifth Circuit *in this case* specifically found that the District Court did impose limitations on the exercise of the jury's discretion to award punitive damages, that adequate appellate review of the punitive award was present with specific factors to consider in analyzing the award, and that Texas law had imposed a reasonableness standard in the assessment of punitive damages. Consequently, this Petition should be denied.

B. THE TEXAS COMMON LAW SYSTEM OF ASSESSING AND REVIEWING PUNITIVE DAMAGES DOES PROVIDE SUFFICIENT DUE PROCESS SAFEGUARDS.

Texas common law has embraced the traditional

common law approach for assessment of punitive damages. As this Court stated in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991):

> Under the traditional common law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by the trial and appellate courts to ensure that it is reasonable...
>
> ... Since every state and federal court considering the question has ruled that the common law method for assessing punitive damages does not in itself violate due process, it cannot be said that that method is so inherently unfair as to be per se unconstitutional. The method was well-established before the Fourteenth Amendment was enacted, and nothing in the Amendment's text or history indicates an intention to overturn it.

Id., at 1042, 1043.

A complete review of this record demonstrates that the jury was given: (1) clear, objective criteria for the imposition of punitive damages; (2) the full panoply of procedural protections; (3) instructions describing the purpose of punitive damages as punishment and deterrence; (4) the instructions required the jury to consider the character and degree of the particular wrong and that the award was not compulsory; (5) the trial court conducted a full post-trial review utilizing established standards to ensure a meaningful and adequate review, including the Petitioner's claim of

multiple prior punitive damage awards; (6) the appellate court conducted a complete review of the evidence supporting the imposition of punitive damages and whether or not the amount of the award was reasonable utilizing established common law standards. Every possible due process safeguard and protection was afforded this Petitioner.

Texas common law has established certain well-recognized rules for the imposition of punitive damages. First, a plaintiff may not recover punitive damages in the absence of a specific finding of actual damages. *Nabours v. Longview Savings & Loan Association*, 700 S.W.2d 901 (Tex. 1985). Second, punitive damages awarded must bear a reasonable proportion to actual damages. *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981). Third, the trial court and appellate court must review the award of the jury for excessiveness. In making that review, the trial court and the appellate court *must* consider at least the following factors: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties; and, (5) the extent to which the defendants' conduct offends the public's sense of justice and propriety. *Id.*, at 910. In addition, this trial court specifically reviewed by post-trial motions and affidavits the history of punitive awards as provided by this defendant. (Plaintiffs have no way to verify the accuracy of the defendant's statements post-trial.) A comparison of these Texas standards with the standards in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032, clearly demonstrates that the Texas common law scheme affords sufficient due process protections.

In attempting to support its contention, Celotex quotes only a portion of the instructions given by the Court. However, a complete review of the instructions demonstrates a clear definition of the objectionable conduct and adequate standards for the imposition of punitive damages. The Court instructed the jury, as follows:

The Plaintiffs also claim that the acts of Defendant was done willfully, intentionally, or with a callous or reckless and heedless disregard and indifference to the rights and welfare of the Plaintiffs, and that such conduct entitles them to an award of punitive damages in addition to compensatory damages.

I instruct you that under the law of Texas a heedless and reckless disregard means more than momentarily thoughtlessness, inadvertence, or error of judgment [sic]. It means such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare or safety of the persons affected by it.

In their claim for punitive damages, the Plaintiffs claim generally that the Defendant acted willfully, intentionally or with reckless indifference in withholding from the Plaintiffs as well as from the public in general information as to the potential dangers of asbestos products and failed to test its products and to warn Plaintiffs long after the Defendant had actual knowledge of the dangers connected with the use of its products.

The Plaintiffs also contend that this action on the part of the Defendant continued for many years and was knowingly designed by the Defendant to cause the Plaintiffs and their household members and other similarly situated workers to remain ignorant of the

> nature of their asbestos products. If you find for the Plaintiffs and if you further find that the Defendant did act with malice, willfulness, intentionally or with the heedless and reckless disregard or indifference to the rights of others, the law would allow you in your discretion to assess punitive damages against the Defendant as punishment and as deterrent to others.
>
> In making your determination as to punitive damages you will consider the totality of the circumstances, and you may consider the financial resources of the Defendant in fixing the amount of such damages.

The *Glasscock* jury instructions, like the *Haslip* instructions, specifically addressed and directed the jury's attention to the purposes underlying punitive damages -- punishment and deterrence. In addition, the instructions clearly informed the jury that the assessment of such damages was entirely within the jury's discretion. Moreover, the *Glasscock* instructions appropriately set forth, in detail, the nature of the conduct or acts that had to be found by the jury before punitive damages could be imposed.

The appellate review of punitive damages in Texas contains virtually the same features as the Alabama system. As the Fifth Circuit correctly demonstrated, "in Texas, both the trial and appellate courts review punitive damage awards to determine if they are reasonably proportioned to actual damages. *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910. As previously outlined, the Texas Supreme Court has provided factors for the Courts to use when conducting this evaluation. Consequently, the Fifth Circuit correctly rejected the argument of Celotex and stated "that the factors set out by the Texas Supreme Court for review of punitive damages

clearly distinguishes the Texas system from simplistic passion and prejudice analysis referred to in *Haslip*." Texas clearly meets the test of *Haslip* by placing meaningful restraints on jury discretion and providing adequate post-trial review.

C. TEXAS LAW SPECIFICALLY PROVIDES FOR APPELLATE REVIEW OF PUNITIVE DAMAGES AND REQUIRES THAT THE PUNITIVE DAMAGE AWARD BEAR A REASONABLE RELATIONSHIP TO COMPENSATORY DAMAGES.

Texas law has established objective standards for reviewing the amount of punitive damages awarded by the jury. In *Nabours v. Longview Savings & Loan Assoc.*, 700 S.W.2d 901 (Tex. 1985) the Texas Supreme Court states that punitive damages must bear a reasonable proportion to actual damages found by the jury. In addition, in *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981), the Texas Supreme Court has set out five factors that should be considered in reviewing whether or not an award of punitive damages is reasonable: (1) the nature of the wrong; (2) the character of the conduct involved; and (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties; and (5) the extent to which the conduct offends a public sense of justice and propriety.

Celotex asserts that the individual awards are arbitrary, based on its comparison of punitive awards to actual damages, after credit for contribution. However, if traditional analysis is applied to the findings of the jury, the ratios of total actual damages to the punitive damages range from 1:1 to 6:1, as follows:

PLAINTIFF	ACTUAL DAMAGES	PUNITATIVE DAMAGES	RATIO
Glasscock	400,000	600,000	1.5
Ghent (Roy)	100,000	600,000	6
Ghent (Lois)	65,000	100,000	1.54

Marsh	600,000	600,000	1
Reich	400,000	600,000	1.5
Starkey	100,000	600,000	6
Geisler	100,000	600,000	6
Lane	100,000	600,000	6
Gonzales	100,000	600,000	6
Smith	100,000	600,000	6
Phillips	300,000	600,000	2

The pattern and intent of a reasonable jury is apparent, rather than an unduly prejudicial jury as Celotex would contend.

The exposure to each of the plaintiffs was substantially similar with the exception of Lois Ghent. All of the plaintiffs, except Mrs. Ghent, were users of the products. Mrs. Ghent's exposure to asbestos was the result of household exposure through contact with her husband's clothing. The jury, obviously, made a distinction between the duty owed to the end product user and bystander exposure. While that distinction may be argued, it is clearly a distinction a reasonable jury could and did make in exercising its discretion concerning punitive damages. Consequently, the Fifth Circuit correctly held that the punitive awards of this jury were reasonable in relation to the compensatory damages and, following the specific and objective criteria for review under Texas law, affirmed the jury verdict.

II. THE ASSESSMENT OF PUNITIVE DAMAGES IN ASBESTOS LITIGATION RELATES TO SPECIFIC INDIVIDUAL HARM AND DOES NOT VIOLATE DUE PROCESS.

Asbestos litigation began with a single plaintiff seeking recovery for his injuries in the case of *Borel v.*

Fibreboard Paper Products Corp., 493 F.2d. 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869. The full extent of the death and disease caused by the manufacturers of products containing asbestos such as this Petitioner was not known at that time by the plaintiff and has still not been fully realized. Only the Petitioner knew the extent of the exposure throughout this country and the thousands it voluntarily and knowingly exposed to asbestos.

This punitive damage award and every punitive damage award has been specifically related to an individual plaintiff. No recovery was ever made on behalf of all that are harmed nor could such an award be assigned. The exposure of individuals occurred over decades. The degree of harm varies from individual to individual from minor disability to death. It is only through the assessment of individual harm and punishment for that individual harm that punitive damages may be awarded. This litigation is unlike most "mass torts" which involve a single catastrophe. This litigation involves individual exposure to individual products by thousands of men and women over decades.

Celotex urges that it is the combination of past awards and the potential of future awards that violates due process. Thus, it argues, having one punitive damage award against it for one individual, all future plaintiffs' rights should be foreclosed. Such a holding by this Court, on this record, would arbitrarily discriminate between plaintiffs in product liability actions. In essence, such a holding would limit an award for punitive damages to the first plaintiff able to win the race to the courthouse and secure an award, or prohibit punitive damage claims after Celotex selected the award it wanted to pay. Clearly, had one plaintiff sought to recover for all future plaintiffs, Celotex would object that it violated the very Texas standards it complains of in this Petition.

Not only does Celotex's view of due process violate both due process and equal protection principles, it would

completely defeat the purpose of punitive damages, which is to punish the wrongdoer and deter further wrongdoing. For example, if an early award of punitive damages, based on an individual's injury, as in these cases, was in the amount of $500, Celotex could voluntarily pay the award and destroy the very purpose of punitive damages. No longer would there be incentive to rectify the harm of defective products through recall, repair or warning. Nor should this Court arbitrarily decide for future "mass torts" at what level punishment is sufficient without any knowledge of the nature of the wrong, the degree of culpability of the parties, the character of the conduct, and the extent to which the defendant's conduct offends the public sense of justice and propriety. Celotex argues that the potential for multiplicity of punitive damage awards should foreclose the right of those injured to recover punitive damages. In essence, its argument is that it injured and caused death in so many people that it should not be punished. A holding by this Court that a manufacturer who causes death in thousands of people is not subject to punitive damages simply because of the magnitude of the harm, completely destroys the policy of deterrence.

Celotex claims that the purpose of punitive damages is negated because its potential liability *may* exceed its ability to pay and that it has now sought protection by voluntarily seeking bankruptcy. Simply because the amount of damages sustained by plaintiffs wrongfully injured *may* exceed the ability of the defendant to pay has never justified *elimination* of the right of recovery or the basis of recovery. No individual or corporation has the right to protection simply because its conduct was so reprehensible that it consciously and intentionally caused death and disease to 65,000 people. The conduct of Celotex consists of multiple acts over several decades against thousands of individuals. The amount of damages awarded *in this action* is specifically related to the amount of individual damage by each plaintiff. Furthermore,

the extent to which these punitive damages will be actually paid now rests with the bankruptcy court.

The simple fact is that Celotex could have introduced evidence of prior awards paid in punitive damages for the jury's consideration and urge that it had been sufficiently punished. Instead, it chose not to tell the jury of any previous punitive award payment and then complained upon appeal that the award of this jury was unjust because of prior awards.

Celotex quotes language from former Chief Judge Charles Clark of the Fifth Circuit, *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 524-525 (5th Cir. 1984) *reversed*, 750 F.2d 1314 (5th Cir. 1985) (en banc), *modified*, 781 F.2d 394 (5th Cir. 1986) (en banc). The opinion cited was reversed and the en banc Court, including Chief Justice Clark, specifically rejected this same argument. The en banc opinion cites *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036 (5th Cir. 1984) *cert. denied*, 105 S.Ct. 1749, 84 L.Ed.2d 814 (1985), applying Texas law, stating:

> ...Texas law does not preclude, but, in fact, apparently grants the right to punitive damages awarded in favor of product liability plaintiffs, even in context of mass asbestos litigation with potential for multiple punitive damage awards against a defendant.

Hansen, 734 F.2d at 1036.

Furthermore, this Supreme Court, as recently as May 28, 1991, has refused to grant Writ on this precise argument in *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *reh'g denied*, 914 F.2d 251, *cert. denied*, 111 S.Ct. 2236 (1991). (A copy of the cover and table of contents of Celotex's brief is attached as Appendix A). Celotex has been afforded the full protection of due process by the trial court and appellate court. Consequently, this

Court should deny this Petition.

CONCLUSION

Contrary to the assertions of Celotex, Texas common law, as previously demonstrated, provided for *fundamental fairness and safeguards* in the award of punitive damages. As previously demonstrated, the jury was fully and fairly instructed concerning gross negligence and the imposition of punitive damages. The trial court and appellate court completely reviewed the underlying evidence and the amount of the award utilizing traditional common law standards. Additionally, both the trial court and the appellate court reviewed Celotex's claim that previous punitive awards should prohibit the imposition of this award.

Clearly, the lower courts recognized that the recovery of punitive damages is an individual right and that these awards were awarded based upon specific individual harm. Celotex chose to present evidence of prior awards in post-verdict motions. The sole evidence was by affidavit, after verdict, without any discovery, cross-examination or investigation concerning the truth of these assertions. The lower courts, after reviewing all of the evidence and instructions upheld the jury verdict. All of the safeguards of due process and Texas law have been afforded this defendant.

Plaintiffs respectfully request that this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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APPENDIX A

NO. 90-_____

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

THE CELOTEX CORPORATION,
Petitioner,
v.
LLOYD D. KING, LOUAN KING, A.B. WILLIS, MOLLY WILLIS, CLETUS GRESHAM, LARRY JONES, BESS JONES, JOHNNY FOWLER, AND MARY MARBLE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ALBERT L. MARBLE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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III

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW 1

LIST OF ALL PARTIES II

TABLE OF CONTENTS III

TABLE OF AUTHORITIES IV

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

I. MULTIPLE AND REPEATED AWARDS OF PUNITIVE DAMAGES AGAINST CELOTEX FOR A SINGLE COURSE OF CONDUCT VIOLATE CELOTEX'S DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION 7

A. MULTIPLE ASSESSMENTS OF PUNITIVE DAMAGES IN MASS TORTS VIOLATE DUE PROCESS GUARANTEES OF FAIR PLAY AND SUBSTANTIAL JUSTICE 9

B. TEXAS PUNITIVE DAMAGE LAW VIOLATES DUE PROCESS GUARANTEES AGAINST VAGUENESS AS TEXAS LAW DID NOT FAIRLY APPRISE CELOTEX THAT ITS CONDUCT WOULD SUBJECT IT TO PUNISHMENT 16

C. THE DISTRICT COURT'S AWARD OF PUNITIVE DAMAGES DEPRIVES CELOTEX OF DUE PROCESS BECAUSE SUCH AWARD WAS GOVERNED BY INADEQUATE GUIDELINES 20

II. A STATEMENT MADE BY COUNSEL DURING CLOSING ARGUMENT BASED ON IMPROPERLY ADMITTED, BUT UNCONTROVERTED, EVIDENCE IS NOT A JUDICIAL ADMISSION 21

CONCLUSION 29

Supreme Court, U.S.
FILED
APR 7 1992
OFFICE OF THE CLERK

(3)

No. 91-1395

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE CELOTEX CORPORATION

Petitioner,

v.

WILLIAM EARL GLASSCOCK, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER THE CELOTEX CORPORATION

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TABLE OF CONTENTS

		Page
TABLE OF CONTENTS		i
TABLE OF AUTHORITIES		ii
I.	*Haslip* Does Not Provide Adequate Guidance to the Lower Courts	1
II.	Texas Law Does Not Provide Sufficient Limits on Jury Discretion in Awarding Punitive Damages	2
III.	Due Process Limits the Repeated Award of Punitive Damages Against a Single Defendant For a Single Course of Conduct	5
CONCLUSION		6

TABLE OF AUTHORITIES

CASES

	Page
Alamo National Bank v. Krause, 616 S.W.2d 908 (Tex. 1981).	3, 4
Edwards v. Armstrong World Indus., Inc., 911 F.2d 1151 (5th Cir. 1990)	3
General Chemical Corp. v. De La Lastra, 815 S.W.2d 750 (Tex. App.—Corpus Christi 1991, no writ)	3
George v. International Society for Krishna Consciousness, Cal. Rptr. 2d , 1992 WL 13838 (Cal. App. 1992) .	2
Hopfmann v. Connolly, 471 U.S. 459 (1985) (per curiam)	6
Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986) (en banc)	5
John Deere Co. v. May, 773 S.W.2d 369, 377 (Tex. App.—Waco 1989, writ denied)	3
King v. Armstrong World Indus., Inc., 906 F.2d 1022 (5th Cir. 1990), cert. denied, 111 S.Ct. 2236 (1991)	5
Marathon Oil Co. v. Sterner, 777 S.W.2d 128 (Tex. App.—Houston [14th Dist.] 1989, no writ)	3
Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (Frankfurter, J.)	6
Pacific Mutual Life Insurance Company v. Haslip, 111 S.Ct. 1032 (1991)	1-2, 4
Southern Life and Health Insurance Company v. Turner, 586 So.2d 854 (Ala. 1991)	2
State Farm Mutual Automobile Insurance Company v. Zubiate, 808 S.W.2d 590 (Tex. App.—El Paso 1991, no writ)	4
Teague v. Lane, 489 U.S. 288 (1989)	5
Tynberg v. Cohen, 13 S.W. 315 (Tex. 1890)	3
Wright v. Gifford-Hill & Co., Inc., 725 S.W.2d 712 (Tex. 1987).	3

No. 91-1395

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Petitioner,

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Respondents.

REPLY BRIEF OF PETITIONER THE CELOTEX CORPORATION

Respondents' Brief in Opposition is long on rhetoric but short on any meaningful response to the issues raised in the Petition for Writ of Certiorari filed by Petitioner The Celotex Corporation[1] ("Celotex"). What is most striking about the Brief in Opposition is that it entirely fails to respond to the issues and cases upon which Celotex relies.

I. *HASLIP* DOES NOT PROVIDE ADEQUATE GUIDANCE TO THE LOWER COURTS

The question of whether this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip,* 111 S.Ct. 1032 (1991) provides sufficient guidance to the lower courts to enable them to resolve due process challenges to punitive damage awards is a question this Court must resolve promptly. As indicated by the frequency and size of punitive damage awards that continue to inundate the courts of this country, A31-34, the courts who must deal with the imposition and review of punitive damage awards on a daily basis need further assistance to define the limitations due process places on punitive damage awards.

1 Celotex's statement pursuant to Rule 29.1 can be found at page iii of Celotex's Petition.

Respondents make no effort to address cases from the state and lower federal courts that contain cries for help, such as *George v. International Society for Krishna Consciousness*, Cal. Rptr. 2d , 1992 WL 13838, at *34 (Cal. App. 1992), which noted that "[o]ther than explaining that Alabama's procedure passes constitutional muster, Haslip offers little guidance as to what would be necessary to render a different system unconstitutional." Respondents make no effort to reconcile this Court's requirement in *Haslip* that punitive damage awards must "have some understandable relationship to compensatory damages," 111 S.Ct. at 1045, with cases such as *Southern Life and Health Insurance Co. v. Turner*, 586 So.2d 854, 858 (Ala. 1991), in which the Alabama Supreme Court—the very jurisdiction whose system was reviewed in *Haslip*—asserted that it has "repeatedly held that punitive damages need not necessarily bear any relationship to compensatory damages." Respondents also make no efforts to explain or justify how due process requirements enunciated in *Haslip* can be met by the widely varying punitive damage multiplier ratios that have been routinely upheld since *Haslip*, A31-32, or how concerns of fairness and reasonableness can be met in a case in which a series of punitive damage awards vary by a factor of more than eighteen.

In short, Respondents' self-serving and conclusory statements that the lower courts are properly applying *Haslip* are belied by the judgments of the lower courts and the results that they affirm. Because of the complexity of the due process issues, this Court must do more than merely decide that the Alabama system considered in *Haslip* passed constitutional muster. This Court must provide additional illumination regarding the threshold at which punitive damage awards exceed the limits of due process.

II. TEXAS LAW DOES NOT PROVIDE SUFFICIENT LIMITS ON JURY DISCRETION IN AWARDING PUNITIVE DAMAGES

Respondents incorrectly compare the punitive damage awards in this case to the total compensatory awards made to each Plaintiff. Whether a punitive damage award is reasonably

proportionate to the compensatory damage award is determined by comparing the punitive award against a particular defendant to that defendant's "allocated share of actual damages." *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1154 (5th Cir. 1990); *John Deere Co. v. May*, 773 S.W.2d 369, 377-78 (Tex. App. —Waco 1989, writ denied). Thus, the punitive damage ratios in this case range from a high of 200:1 to a low of approximately 7:1, as set forth on page 3 of Celotex's Petition.

Respondents make much of the decision in *Alamo National Bank v. Krause*, 616 S.W.2d 908 (Tex. 1981), setting forth factors that a reviewing court can consider when reviewing punitive damage awards for excessiveness. In fact, Respondents represent to this Court that, under Texas law, "the trial court and the appellate court *must* consider at least" the factors set forth in *Alamo National Bank*. Brief in Opposition at 7 (emphasis in original). But nothing in *Alamo National Bank* makes consideration of those factors mandatory; at least one Texas court of appeals recognizes the *Alamo National Bank* factors are merely guidelines "which should be considered," *General Chemical Corp. v. De La Lastra*, 815 S.W.2d 750, 758 (Tex. App.—Corpus Christi 1991, no writ), not that they *must* be considered. Indeed, despite the mechanical invocation of the *Alamo National Bank* decision, Texas courts continually maintain that standards for review of punitive damage awards are merely "a tool to aid the courts in determining when an exemplary damage award is the product of passion rather than reason." *Wright v. Gifford-Hill & Co., Inc.*, 725 S.W.2d 712, 714 (Tex. 1987) (quoting *Tynberg v. Cohen*, 13 S.W. 315, 316 (Tex. 1890)). *See also Marathon Oil Co. v. Sterner*, 777 S.W.2d 128, 132-133 (Tex. App.—Houston [14th Dist.] 1989, no writ). Further, Texas law does not require that a jury be instructed on any of the factors contained in the *Alamo National Bank* decision.

Respondents ignore the admissions by both state and federal courts that the Texas system for review of punitive awards provides no objective standards for judicial review. The Fifth Circuit, in this very case, recited that it would apply the *Alamo National Bank* standards but then emphasized "the difficulty in

applying this test," A-17, as well as "the inherent problems with the purely subjective Texas rule." *Id.* In *State Farm Mutual Automobile Insurance Co. v. Zubiate,* 808 S.W.2d 590 (Tex. App. —El Paso 1991, no writ), the appellate court could not give any objective criteria to use in review of punitive damage awards. Instead, the *Zubiate* court rhetorically asked itself why a punitive award that was 91 times the compensatory award was excessive, and could only answer, "*Because it just is.*" 808 S.W.2d at 605 (emphasis in original). In his concurrence, Chief Justice Osborn was even more direct when he recognized that "in awarding the exemplary damages, the jury's determination is an arbitrary process without any objective standards," and that the *Alamo National Bank* standards do not give "either the jury or the appellate court any standards by which to make a proper determination of" the amount of punitive damages. 808 S.W.2d at 606.

Respondents' discussion of the jury issue given in this case also side-steps the real issue. As the excerpt at pp. 8-9 of the Brief in Opposition shows, most of the jury instruction regarding punitive damages focused on the state of mind necessary to support an award of punitive damages under Texas law. The jury was encouraged to exercise its unrestrained discretion when it was told to consider "the totality of the circumstances." The *only* objective factor that the jury was told to consider was the financial resources of the defendant. This Court can obviously recognize the crucial differences between the jury instruction reviewed in *Haslip* and the instruction which the trial court gave in this case.

Despite Respondents' unsupported statements to the contrary, the judges that must try to apply the Texas system of punitive damages admit that it is arbitrary, subjective, and lacking in meaningful standards. The Texas system of punitive damages is founded on precisely the type of unrestrained and unguided jury discretion that due process, as well as this Court's decision in *Haslip,* condemns.

III. DUE PROCESS LIMITS THE REPEATED AWARD OF PUNITIVE DAMAGES AGAINST A SINGLE DEFENDANT FOR A SINGLE COURSE OF CONDUCT

Respondents attempt to justify the serial award of punitive damages against a single defendant for a single course of conduct by the non sequitur that each award of punitive damages "has been specifically related to an individual plaintiff." Brief in Opposition at 12. This response fails for two reasons. First, it is an attempt by Respondents to incorrectly shift the focus of punitive damage awards from the conduct of the defendant to that of the plaintiff. Second, it completely ignores the fact that repeated punitive damage awards are totally inconsistent with any reasonable purpose that is alleged to underlie the imposition of punitive damage awards.

Respondents also claim that prior Fifth Circuit decisions have rejected Celotex's due process argument concerning multiple punitive damage awards. This is incorrect, because the Fifth Circuit has failed to ever address the due process limitations of multiple punitive damage awards. Instead, the Fifth Circuit originally based its ruling upon Mississippi state law grounds. *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 415 (5th Cir. 1986) (en banc). Other cases since that time felt bound by the *Jackson* decision, although some panels of the Fifth Circuit have followed *Jackson* only after stating their "misgivings" with the holding on this very issue. *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1033 (5th Cir. 1990), *cert. denied,* 111 S.Ct. 2236 (1991). The Fifth Circuit has never addressed the due process limitations on multiple punitive damage awards on the merits, and Respondents have not even tried to address the many decisions that have found due process violations in repeated punitive damage awards that are discussed at pages 17-18 of Celotex's Petition.

Respondents seemingly place some importance on the fact that this Court denied Celotex's Petition for Writ of Certiorari in the *King* case. However, as this Court has had to state repeatedly, the denial of a writ of certiorari constitutes no expression of opinion upon the merits of the case. *Teague v. Lane,* 489 U.S. 288, 296

(1989); *Hopfmann v. Connolly,* 471 U.S. 459, 461 (1985) (per curiam). *See Maryland v. Baltimore Radio Show, Inc.,* 338 U.S. 912, 917-18 (Frankfurter, J.).

CONCLUSION

For the reasons set forth in its Petition for Writ of Certiorari, The Celotex Corporation requests that the judgment against it be modified to deny any recovery of punitive damages or, alternatively, that the judgment be vacated and the cause remanded for further proceedings.

Respectfully submitted,

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